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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

JOHN N. MITCHELL, ET AL., *Petitioners,*

v.

HONORABLE JOHN J. SIRICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, John N. Mitchell and Kenneth Wells Parkinson, petition this Court for a writ of certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit in denying their Petition for Writ of Mandamus or Prohibition.

OPINION BELOW

The Opinion and Order of the district court denying, without a hearing, Petitioners' motions for the recusal of the Honorable John J. Sirica is set forth as Appen-

dix number 1. Petitioners jointly filed a petition for a Writ of Mandamus or Prohibition in the United States Court of Appeals for the District of Columbia Circuit. The Order denying the Petition and the opinion of dissenting circuit Judge MacKinnon are set forth as Appendix number 2.

JURISDICTION

The order of the Court of Appeals was entered on June 7, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit Court erred in denying the petition for a writ of mandamus or prohibition ordering the Honorable John J. Sirica to withdraw from further participation in the case of *United States* v. *Mitchell, et al.*, Criminal Action No. 74-110, in view of any or all of the following reasons:

(a) The conduct of the trial judge himself is the subject of relevant evidence which will be before the jury.

(b) The trial judge, by his conduct in presiding over the trial of the original seven Watergate defendants (*United States* v. *Liddy, et al.*, Crim. No. 72-1887), and in supervising the Grand Jury investigation of this matter has fused the prosecutorial and judicial roles.

(c) The trial judge has shown a personal bias and prejudice in favor of the prosecution.

(d) The trial judge has a substantial personal interest in the present case.

(e) The relationship between the prosecutor and trial judge demonstrates actual bias or an intolerable appearance of bias in favor of the prosecutor.

2. Whether, in the alternative, petitioners were entitled to a hearing on their motion and petition to develop evidence in support of the allegations that the trial judge (a) participated in the investigative process, and (b) acted in an accusatory manner.

STATUTES

28 U.S.C. § 144

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 U.S.C. § 455

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

STATEMENT OF THE CASE

This case presents for review the denial by the trial court and by the United States Court of Appeals for the District of Columbia the applications seeking the recusal of the Honorable John J. Sirica and in the alternative seeking an evidentiary hearing in support of the application for recusal.

Petitioners were named in an indictment for alleged violation of 18 U.S.C. Sections 371, 1503, 1001, 1621 and 1623, on March 1, 1974. Defendants filed in the district court Motions to Disqualify the Honorable John J. Sirica and for an Evidentiary Hearing. The defendants requested that the Motion be referred to the Calendar Committee of the District Court as an appropriate disinterested panel.

A. The Affidavits

The defendants each filed affidavits of personal bias on the part of Judge Sirica in favor of the prosecution. Additionally, the affidavits described a significant series of actions and statements by Judge Sirica in connection with the case of *United States* v. *Liddy, et al.,* (D.C. D.C. Cr. No. 72-1827) and the Grand Jury investigation leading to the subject indictment which, Petitioners contended, required recusal.

There is set forth as Appendix 3 the affidavits filed by the defendants in the trial court in support of the Motion to Recuse. The affidavit set forth the following:

1. That Judge Sirica in the course of supervising the Grand Jury investigation familiarized himself with much of the evidence involving the defendants. He listened to tape recordings of conversations of the de-

fendants and he reviewed the evidence forwarded by the Grand Jury to the House of Representatives.

2. He met privately with the prosecutor on at least two occasions.

3. In the conduct of the 1973 Watergate trial, Judge Sirica went far beyond the issue of the guilt or innocence of the defendants then on trial. He interrogated witnesses as to the involvement of others not on trial and he took what appeared to be a prosecutorial interest in unraveling the entire Watergate issue.

B. The Presidential Transcripts

On April 30, 1974, the same day that Judge Sirica denied the motion, the President released transcripts of several recorded conversations revealing discussions concerning Judge Sirica himself by defendants and the President, an unindicted co-conspirator. In fact, the attitudes expressed by some of the alleged co-conspirators are critical of Judge Sirica and his conduct of the first Watergate trial.

C. The Disposition of the Motion for Recusal by Judge Sirica

Judge Sirica disposed of the Motion for Recusal without a hearing, although the motion sought an evidentiary hearing to develop information concerning Judge Sirica's private meetings with the prosecutor.

In his opinion and order entered on April 30, 1974, Judge Sirica found that the allegations of the affidavits were insufficient to establish "personal" bias or prejudice.

The opinion went on to find the allegations of the affidavit insufficient to establish "personal" bias or

prejudice within the meaning of § 144, because "Every action, decision and comment of the court cited by defendants arose in the course of official judicial activity" (Op. p. 12) and because "the intent * * * throughout the proceedings, was to ascertain the truth and protect the integrity of the judicial process" (Op. p. 14). To the allegations that his role and public image as a Watergate activist give him a personal interest in vindication by conviction, Judge Sirica responded that "The Court feels no need for vindication of any sort * * *"

* * * * * * * * * *

Judge Sirica's opinion did not deal with the question raised by the tapes because the tapes were not released by the President until April 30, 1974.

D. The Court of Appeals Decision

On June 7, 1974, the U. S. Court of Appeals for the District of Columbia, sitting *en banc,* upon consideration of the pleadings but without oral argument, denied the writ of mandamus or prohibition directing that respondent, United States District Judge John J. Sirica, proceed no further and be disqualified as presiding judge in *United States* v. *John N. Mitchell, et al.* Circuit Judge MacKinnon filed a dissenting opinion.

REASONS FOR GRANTING THE WRIT

I. THE CONDUCT OF THE TRIAL JUDGE HIMSELF IS THE SUBJECT OF RELEVANT EVIDENCE WHICH WILL BE BEFORE THE JURY.

Since Judge Sirica's opinion denying the motion to recuse was filed on the same day that the tapes under discussion were disclosed, that is April 30, 1974, this matter was not raised before Judge Sirica. However, the transcripts were made a part of the record for con-

sideration by the United States Court of Appeals in its review of Judge Sirica's Order. Unfortunately, counsel were unable to study and consider the effect of the tapes, and regretfully the argument Court of Appeals was not focused with the precision which this point requires. In fairness to Judge Sirica, the matter probably should have been presented to him for consideration. Nevertheless, events in this case are moving with such speed, and the need for relief is so urgent, that counsel urge this Court to consider the matter in spite of the fact that it was not raised at the trial level. To now raise it at the trial level would mean that valuable time would be lost and the surrounding circumstances with respect to this need for recusal might also be in the process of piecemeal appeals.

On May 21st the tapes disclosed the following conversations:

Mr. Dean said:

"D Well, really I think what will complicate the problem will be Sirica giving a speech from the Bench on Friday when he sentences. Where he will charge that he doesn't believe that the trial conducted by the lawyers for the government presented a legitimate case and that he is not convinced that the case represents the full situation.

* H In other words—

D It will have a dramatic impact coming from the Bench.

P That's right.

D I may say in Sirica's defense, it has been charged that there are higher-ups involved in this.

* H=Haldeman, P=President Nixon, D=Dean.

He may take some dramatic action like, he might appoint a special prosecutor. Who knows?

P Can he do that?

D Sure.

* * * * *

D * * * And see if they will now want to talk. When it comes to Sirica and sentencing, he may be giving the ones who talk a lesser sentence. If they don't talk, he will probably leave these long sentences stand." (p. 267-268)

The following month, on April 17, 1973, during a meeting between the President and Assistant Attorney General Henry Petersen, the President and Mr. Petersen discussed in detail the subject of whether John Dean should be granted immunity from prosecution in connection with the investigation, or whether he should be required to plead to a lesser charge. Mr. Petersen explained why the government had difficulty with this crucial topic:

"HP [Assistant Attorney General Petersen] You know . . . even if I come up with a lesser charge that damn Sirica is just liable to blast hell out of all of us to prevent him to plead even to a lesser charge. The ideal position would be the same as Magruder—you plead to one count felony indictment—take your chances." (p. 1093).

Later in the same conversation, the President and Mr. Petersen discussed whether defendants Haldeman and Erlichman were to be named in any upcoming indictments as conspirators or to be on a non-indictable list. The President said that Mr. Magruder had not implicated Mr. Haldeman or Mr. Erlichman, but Mr.

Petersen expressed what may be a reason for their indictment:

> "HP And if we frankly—if we think that Sirica is going to elicit that kind of statement, we will include him in the charge to the extent that we can.
>
> * * * * *
>
> P OK—I can see what you mean. You would anticipate then that if you didn't include Haldeman and Ehrlichman in your general thing that Sirica will question the defendant—Magruder—and then he will bring in—
>
> HP If he brings that out—if we think that is a real possibility then we will have to decide whether or not as a matter of conscience and professional ethics we can put them in. If we can answer that yes—then we will put them in. If on the other hand, we think there is no basis for it—even if Sirica does bring out the hearsay—we will just have to take the knuckle for it.
>
> P Sure—which is basically what Sirica wants. Colson—I think we should know about him too." (p. 1106-1108).

In a later meeting on April 17, 1973, between the President, Secretary of State William Rogers, Mr. Haldeman, and Mr. Ehrlichman, the President recounted his conversation with Mr. Petersen and called such action by the Judge "a hell of a prejudicial thing to do." (P. 1141).

Later in the same conversation Secretary Rogers and the President said:

> "R Is he going to (unintelligible) accuse other people in open court?

The pertinent portions of the above conversations are set forth as appendix 4. It is common knowledge

that the Presidential submission contains many deletions and omissions. It well may be that more tapes will be offered by the President either voluntarily or pursuant to court order. These as yet undisclosed tapes may very well contain further references to Judge Sirica.

With what has already been disclosed in conversations at vital points in the alleged conspiracy there is the prospect that the defendants must explain the analysis of Judge Sirica's conduct set forth on the tape. The special prosecutor may also wish to project a theory showing that the commentary about Judge Sirica coincides with the so-called cover up. This would require the jury to determine whether Judge Sirica's conduct was subject to valid criticism by these defendants or whether the criticism of his conduct was a manifestation of criminal intent. It would be most unfair to require the defendants to comment on the sitting judge's motivations.

The special prosecutor may claim that the conversations involving Judge Sirica will not be offered. This does not solve the problem. A key governmental witness, John W. Dean III, also is involved in the tapes and the defendants are entitled to explore his motivations with respect to his analysis of Judge Sirica's conduct. The references to Judge Sirica are matters which defense counsel will legitimately use in the cross examination of Mr. Dean.

The Court of Appeals for the District of Columbia Circuit has recently said that:

> "The permissible scope of exploration on cross examination is not curtailed by the absence of ex-

plicit government promises of leniency, for the defense may attempt to show 'government conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation.'" *United States* v. *Leonard*, — F.2d —, 102 Daily Washington L. Reptr. 417 at 421, (D.C. Cir., Jan. 31, 1974).

The colloquy in which Judge Sirica is discussed demonstrates an apprehension by Mr. Dean, concerning his role in the cover-up. In exposing his state of mind, it is essential to chart the commencement of his fear of judicial retribution at the hands of Judge Sirica. It should be noted that John Dean III still remains subject to sentence before Judge Sirica. The identified conversation is arguably the point where Mr. Dean was charting his own course. To deny the defendants the right to fully explore Mr. Dean's role is a substantial denial of the defendants' rights. Especially is this so in a conspiracy case where the law permits the prosecutor to claim the benefit of advantages unobtainable in the prosecution of substantive offenses. If the curtailment of the defendants' rights is based upon the need to have Judge Sirica sit in this case, then the need to recuse is clear. No right of a defendant should be altered so that any one particular judge can sit. There are many judges available whose presence presents none of the problems which appear if Judge Sirica sits. As a collateral observation, one wonders whether a judge who has been criticized and evaluated as Judge Sirica has been can sit and dispose of issues with the cold neutrality which justice requires. In the analogous situation involving a contempt proceedings, the law forbids the judge who

has become personally involved from sitting in judgment of the contempt. *Offutt* v. *United States,* 348 U.S. 11 (1954).

What is fairly certain is that the conduct and statements of Judge Sirica will be the subject of certain evidence that will be presented to the jury. It is submitted that the evil that § 455 was intended to avoid by requiring recusal where a judge is a material witness is much the same evil that will arise by allowing this evidence to come in before a jury trial over which Judge Sirica presides. *Brasher* v. *State,* 20 So. 2d 75 (Miss. 1937), a fairly typical case in which a state court reversed a conviction because of the trial judge's participation as a witness. The Court made this observation, the spirit of which is equally applicable to the instant case:

> "It is a tribute to our judicial system that the words and actions of trial judges have great weight with the trial juries. They observe closely the judges actions and weigh carefully his words, and are greatly influenced by what they think are his reactions. It is impossible to ascertain the weight and influence of the testimony of the trial judge with the jurors. The jurors are subordinate to the judge. He has large control over them. They are necessarily embarrassed to weigh his evidence against that of another and find for the other. And, while the trial judge may be very reluctant to take the stand and complies with the request solely to serve the ends of justice by making a full disclosure, which unquestionably was the case here, the greater the character and standing of the judge the greater the danger of this procedure. It is the supreme duty of a trial judge, in so far as it is humanly possible, to hold the scales of justice evenly balanced between the litigants."

Much of the potentially admissible material is pregnant with inferences and implications from which the jury may interpret, correctly or incorrectly, Judge Sirica's feelings and personal opinions on certain pertinent issues, possibly including the guilt and innocence of defendants in the case. The jury's exposure to such evidence must be considered in view of the intense national publicity praising Judge Sirica's role in unravelling the "Watergate," which these jurors, like all other Americans, must be aware of. All of this will result in the jurors making their own deductions of Judge Sirica's views of this case and the "Watergate" situation generally. These deductions will have an unknown impact on their deliberations, but an impact which is surely not contemplated by the Constitution.

Many of the reported cases dealing with the question of a judge testifying in a case over which he presides arise under 28 U.S.C. § 2255. Courts have suggested that the presiding judge ought to disqualify himself in § 2255 cases where the possibility exists that he himself might be a witness in the cause, e.g., *United States* v. *Valentine,* 283 F.2d 634 (2nd Cir. 1960), and *United States* v. *Halley,* 240 F.2d 418, 419 (2nd Cir.), *cert. denied* 357 U.S. 967 (1957). In *Halley,* the Court noted that where other judges in the district were available to hear the case and a change of venue was not required, the wiser procedure was recusal.

However, in the instant case, there is no mandate that Judge Sirica must hear this case as opposed to another district judge, for the District of Columbia. The presiding judge's involvement in the evidence presents the same difficulties and potential due process deprivations, as if the Judge took the stand and testified.

This Court should grant certiorari and review the lower court's decision to prevent the denial of the defendants' constitutional right to a fair trial.

II UNDER ALL THE CIRCUMSTANCES, IT IS INAPPROPRIATE THAT JUDGE SIRICA PRESIDE OVER THIS CASE

We do not reiterate in this petition the full statement of the facts and the law set forth in the Motion and Joint Affidavit below. Rather, we respectfully refer the Court to those papers (Appendix A, *infra*), and discuss here only the salient points of error in the Opinion and order below.

It is firmly established that the only issues before the district court were issues of law. The factual assertions in the Joint Affidavit must be taken as true for purposes of determining bias or prejudice. *Berger* v. *United States,* 255 U.S. 22 (1921); *Tynan* v. *United States,* U.S. App. D.C. —, —, 376 F.2d 761, 764 (DC. Cir. 1967). In any event, there is no substantial disagreement or doubt about the pertinent objective facts. The question before this Court is whether those facts, taken together, require disqualification. Petitioners submit that they do, and that Judge Sirica erred most egregiously in the following particular respects.

A. Judge Sirica Erred in Holding that the Bias and Prejudice Asserted in the Joint Affidavit Was Insufficient Because It "Arose in the Course of Official Judicial Activity."

Apart from his denials of actual bias or prejudice—which are not cognizable under § 144—Judge Sirica's finding of insufficiency in the Joint Affidavit was based upon the proposition that all of the pertinent actions, comments, exposures to evidence and contacts with the prosecution occurred in the exercise of judicial functions. We do not dispute the fact that Judge Sirica was

performing judicial functions, in the broad sense, in conducting the *Liddy* trial, sentencing thereafter, supervising the Grand Jury and handling the miscellaneous proceedings that have come before him in connection with the Watergate investigations. What we do consider crucial is that this all occurred either in *ex parte* proceedings or in proceedings to which the present defendants were not parties.

We acknowledge the authorities cited in the Opinion (pp. 4-10) for the broad proposition that only bias and prejudice stemming from an "extrajudicial source" disqualifies under § 144. However, the one Supreme Court decision in which this language appears, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966), makes it clear both by its facts and by its language that the principle properly means nothing more than that there is nothing improper in a judge's developing opinions about a particular case "from his participation in the case" (*ibid.*). Neither *Grinnell* nor any decision by this Court has stretched the principle to sanction preconceptions developed pro or con a particular party from judicial participation in a prior, separate case where that party was not present. Indeed, only one of the cases cited from this Circuit even discussed any such principle, and that case emphasized that the § 144 affidavits there alleged "only acts and conduct occurring in the courtroom during the trial of the present case or in relation to the court's official action in ruling upon issues and questions of conduct which were a part of the court proceedings in this case." *Tynan* v. *United States*, — U.S. App. D.C. —, —, 376 F.2d 761, 765 (D.C. Cir.), art. denied 389, U.S. 845 (1967). Here, in contrast, all of the allegations relate to occurrences and

comments preceding the present indictments and in proceedings not including those defendants.

Plainly, the purpose of § 144 is to assure that a judge presiding over a case is not influenced by anything other than the evidence in that case. It is therefore irrelevant whether the preconception arose in the street or in some other courtroom; "personal" bias or prejudice exists, whatever its source, if it is something that the judge brings with him to the proceedings in this case rather than developing in the course of these proceedings. See, *e.g., United States* v. *Womack,* 454 F.2d 1337, 1341 (5 Cir. 1972); *United States* v. *Parker,* 447, F.2d 826, 829 and n.4 (7 Cir. 1971). That is precisely what is in question here, and the "judicial" talisman was no basis for Judge Sirica's failure to give effect to petitioners' otherwise sufficient affidavit.

B. Judge Sirica Failed To Appreciate the Disqualifying Inconsistency Between the Judical Role He Assigned Himself in This Case and His Role in Developing the Indictments To Be Tried in This Case.

The Opinion below focused almost solely upon the provisions of § 144 relating to "personal bias or prejudice." It gave short shrift to the constitutional separation between the accusatory and judicial functions, dismissing the argument on this point (Motion pp. 6-12) with nothing more than the irrelevant suggestion that there was stronger indication of bias in such constitutional cases as *In re Murchison,* 349 U.S. 133 (1955). It ignored the dispositive neutral principle that "[h]aving been a part of [the accusatory] process a judge cannot be, *in the very nature of things,* wholly disinterested in the conviction or acquittal of those accused" (*id.* at 137; emphasis added).

The Opinion below also gave no real consideration to petitioners' separate argument that Judge Sirica's role in the development of the prosecution and his resulting public image as a Watergate activist gave him a "substantial interest" in the outcome requiring statutory disqualification under § 455 (Motion pp. 13-16). Nor did it consider the relevance of the Code of Judicial Ethics as adopted by the Judicial Conference of the United States in April 1973. Canon 3 of that Code provides in part as follows (emphasis added):

> DISQUALIFICATION.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * * *
>
> (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any *other interest that could be substantially affected by the outcome of the proceeding* * * *."

For purposes of the prohibition upon a judge's sitting in a case in which he has an "interest," it is pertinent that the Supreme Court defined the problem in *Murchison* by stating that the judge's prosecutorial role there had given him an unacceptable "interest in the outcome." In *Adams* v. *United States,* 302 F.2d 307, 310 (5 Cir. 1962), the court held that "Although it is doubt-

less true that the term 'substantial interest' [as used in § 455] normally refers to a pecuniary or beneficial interest of some kind, we construe the language broadly enough to comprehend the interest that any lawyer [*i.e.*, a former prosecutor] has in pursuing his case to a successful conclusion." The relevance of a prosecutorial interest is even more clear under the Code of Judicial Ethics, which refers first to "financial interest" and then establishes a separate category for "any other interest that could be substantially affected by the outcome of the proceedings." For the reasons elaborated in the Motion and Joint Affidavit, we submit that Judge Sirica's role in the bringing of the present indictment unavoidably gave him such an "interest."[1]

As the Motion made clear, we do not here contend, nor need we, that there was any impropriety in Judge Sirica's conduct of the 1973 *Liddy* trial or in his supervision of the Grand Jury or even in his *ex parte* contacts with the Special Prosecutor or his successful use of a sentencing procedure calculated to induce those defendants to cooperate with the Prosecutor. Nor need we contend in this context that those activities have given rise to any bias or prejudice in favor of the prose-

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[1] The only discussion in the Opinion below even touching on the "interest" issue (Op. pp. 17-18) consists of (1) a denial of any subjective desire for vindication, (2) a statement that there are insufficient facts "to reasonably support a contrary conclusion", and (3) a statement that, again as a subjective matter, "[t]he Court's sole interest here, as always, is a professional interest in the proper administration of justice." The last phrase would be as accurate a description of the "interest" of any responsible prosecutor as to the facts, we do not beleive that such a sensitive matter should rest upon any balancing of a judge's statement about his state of mind. In any event, the Opinion missed the point by treating this problem as a question of bias or prejudice.

cution or against the present defendants. Our point is, rather, that—*vis a vis* the present defendants— those activities unavoidably took him over the "constitutional line" that separates the prosecutorial from the judicial functions. *Billeci* v. *United States,* 184 F.2d 394, 402 (D.C. Cir. 1950). "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." *United States* v. *Marzano,* 149 F.2d 923, 926 (2 Cir. 1945). As the Supreme Court observed in *Murchison, supra,* 349 U.S. at 136,

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' "

Accordingly, Judge Sirica was obliged to disqualify himself wholly apart from any consideration of bias or prejudice.

C. In a Situation that Demands Every Assurance of the Most Punctilious Judicial Neutrality, It Was Not Enough for Judge Sirica To Consider Only the Minimal Statutory Prohibitions as He Perceived Them.

Beyond the errors in interpreting §§ 144 and 455 and the requirements of due process, the Opinion below is pervaded by a niggardly approach that ill befits any consideration of judicial disqualification even in a case far less sensitive than this. In part, this amounts to a misplacement of the burden of proof and a misapprehension of the ultimate question, and for the rest it amounts to a cumulative abuse of discretion that requires correction under the supervisory power of this Court.

Judge Sirica put the entire problem in the wrong framework by invoking the traditional maxim that a judge has a "duty to sit" as strong as the duty of recusal. To be sure, this Court and others have previously articulated that maxim. But the Opinion failed to take account of the fact that it has been superseded in the federal courts by the April 1973 adoption of the new American Bar Association Code of Judicial Ethics, which establishes the converse rule that a judge must disqualify himself whenever "his impartiality might reasonably be questioned."[2] Thus, the entire Opinion below is vitiated by the pervasive attitude that defendants must provide evidence *requiring* an inference of bias or prejudice.

Putting the matter another way, Judge Sirica failed to appreciate the rule not only made explicit in the Code but also articulated in the more recent cases that

> "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968).[3] *In Whitaker* v. *McLean*,

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[2] See Reporter's Notes to the Code. In addition to having been adopted by the Judicial Conference, the substance of the Code (including this language) is incorporated in a bill to amend § 455 that has been passed by the Senate and is awaiting House Action (S. 1064, 93rd Cong. 1st Sess.). That this language abolishes the "duty to sit" rule is clear from the Report on the bill (S. Rep. No. 93-419 at p. 9) and the Senate Hearings (at pp. 40, 110). The Code has also been adopted by the District of Columbia Court of Appeals.

[3] This is the meaning of the Code's introductory phrase "*might* reasonably be questioned." "The test actually adopted in the Code • • • seeks to guarantee not only that a biased judge will

— App. D.C. —, 118 F.2d 596 (D.C. Cir. 1941), the Court observed that "The policy * * * is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; *i.e.,* shall appear to be impartial." And it has been held that an administrative hearing—to saying nothing of a criminal trial—

> "must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a * * * proceeding meet the basic requirement of due process."

Texaco v. *F.T.C.*, — U.S. App. D.C. —, —, 336 F.2d 754, 760 (D.C. Cir. 1964),[4] quoting from *Amos Treat & Co.* v. *S.E.C.*, 113 U.S. App. D.C. 100, 107, 306 F.2d 260, 267 (D.C. Cir. 1962). In short, "[a] judge, like Caesar's wife, should be above suspicion." *Pfizer, Inc.* v. *Lord*, 456 F.2d 532, 544 (8 Cir. 1972).

It was thus not enough that Judge Sirica found no literal statutory violation in his continuing to sit. For especially in a case of the public importance and sensitivity of this case, the appearance of impartiality would not be assured even if the preponderance of the evidence did not establish bias or prejudice or an improper interest. This case, if not all cases under the new Code,

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not participate but also that no reasonable person will suspect as much; the apearance of impartiality throughout the judiciary is the goal [citing the Reporter's Notes to the Code at 61]." Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 745 (1973).

[4] Vacated on other grounds and remanded for further proceedings without the disqualified Commissioner, *F.T.C.* v. *Texaco, Inc.*, 381 U.S. 739 (1965).

requires application of the strictest standard articulated by the most punctilious of jurists—the standard applied in *United States* v. *Zarowitz,* 326 F. Supp. 90 (C.D. Cal. 1971), where Judge Hauk disqualified himself because prior judicial involvement in grand jury proceedings created "perhaps the *appearance* of a *possibility* of personal bias or prejudice"; the standard applied by Judge Youngdahl in *United States* v. *Quattrone,* 149 F. Supp. 240, 242 (DDC 1957) ("the most scrupulous concern for appearances as well as for facts"); the standard reflected in the analogous rules of the Seventh Circuit[5] and the Southern District of New York[6] that a judge who has once tried a case should not ordinarily preside over a retrial upon remand; and the standard of Mr. Justice Frankfurter's classic statement in *Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 466-467 (1952):

> "[I]t is * * * true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

The Opinion below did not dispel the appearance of bias, prejudice, interest and partiality that unavoidably emerges when all of the circumstances are viewed

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[5] Circuit Rule 23. See also *United States* v. *Parker,* 447 F.2d 826, 829 and nn. 2, 4 (7 Cir. 1971).

[6] See *United States* v. *Bryan,* 393 U.S. 90 (2 Cir. 1968).

together. Among other considerations, the Judge could not properly rely on his personal knowledge of "his own thoughts and feelings and the complete context of facts alleged" (Op. p. 2) and "follow his own conscience" (Op. 22 n. 11) to the exclusion of the impartial consideration of the Calendar Committee that petitioners requested.[7] It turns both the Code and the statutes on their heads to assert that "introspection" may be relied on to "dictate * * * non-recusal in circumstances where other judges would reach the opposite conclusion based on their necessarily incomplete knowledge of the situation" (Op. p. 17 n. 8); for it is only such objective information that can be considered in determining whether there is an appearance of impropriety and the Judge's subjective feelings cannot contradict it. By the same token, this is not a situation where the parties and the public should have to rely upon a Judge's personal assurance that his *ex parte* contacts with the prosecution were not prejudicial; at the very least, the record must reveal just what those contacts were. And it is especially pertinent to recall how this case was assigned to Judge Sirica—not by any impersonal process but by his own decision in his former role as Chief Judge, making the burden of dispelling the appearance of partiality or interest especially heavy.

Even if there were no statutory violation involved in Judge Sirica's refusal to disqualify himself, this Court may direct him to comply with the requirements of the Code of Judicial Ethics in the exercise of its super-

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[7] The Special Prosecutor agreed that referral to the Calendar Committee "might be reasonable under all the circumstances." Memorandum of the United States at p. 5.

visory powers. *E.g., LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957); *Offutt* v. *United States, supra,* 348 U.S. at 13. Both fairness to defendants and public confidence in the administration of justice require no less.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a writ of certiorari to review the denial of the petition for writ of mandamus or prohibition and should grant Petitioners' accompanying request that this matter be expedited.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 74-110

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET AL.

OPINION AND ORDER

(Filed April 30, 1974)

The present criminal case derives from a thirteen-count indictment charging seven individuals with conspiracy to obstruct justice and other offenses. The Court now has before it two motions, timely filed, for disqualification. Three defendants, John N. Mitchell, John Ehrlichman and Charles Colson jointly move that the Court be disqualified from further participation in this case pursuant to the provisions of Title 28 United States Code §§ 144 and 455 [1] and

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[1] § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

§ 455. Interest of justice or judge.

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

the Fifth and Sixth Amendment rights to a fair trial. Defendant Gordon Strachan moves for disqualification or voluntary recusal on the same basis. Defendant Kenneth Wells Parkinson joins in both motions. The remaining two defendants, Harry R. Haldeman and Robert C. Mardian have not participated.

I

Defendants Mitchell, Ehrlichman and Colson joined by defendant Parkinson have moved that the disqualification motions be referred to the Court Calendar Committee for disposition. The Special Prosecutor in his submission notes that, although such motions are ordinarily determined by the challenged judge, in a few instances judges have elected to refer such decisions elsewhere. He does not object to that being done here. The Court, however, is strongly opposed to such a procedure. To the Court's knowledge, the practice is without precedent in this Circuit. It is permissible at best, and under the statutes that govern here, may be improper. § 144 lays the decision-making burden upon the judge involved, and the part of § 455 most strongly relied upon by defendants calls specifically for the judge's opinion. "The Supreme Court has ruled that the judge has a lawful right to pass on the legal sufficiency of the affidavit. . . . subject to appellate review, of course, and we consider it the duty of the judge, when the showing for recusation is insufficient, to remain in the case." *Fisher v. United States,* 170 F.2d 273, 287 (D.C. Cir. 1948). See also *United States* v. *Bell,* 351 F.8d 868, 878(6th Cir. 1965) (challenged judge has duty to pass on sufficiency) and cases cited therein. A judge challenged under these statutes ought to be willing to shoulder the responsibility of ruling in the matter. Only the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged. It follows that only he can be certain of the most equitable resolution. If the judge errs in his determination, the proper remedy is in appellate review. These considerations plus the delay inherent in the suggested procedure

have convinced the Court that in acquiescing it would be setting a most unwise precedent. The motion is therefore denied.

Likewise the proposed evidentiary hearing is unnecessary. The facts surrounding the Court's suggestion of possible grand jury witnesses are on the record under seal. The transcript will be made available to counsel at their request. In regards to the Court's meetings with Special Prosecution Force personnel, there are no relevant facts to be had. These proceedings included no discussion of evidence bearing on the guilt or innocence of any defendant in this case nor any discussion even remotely of the kind. An inquiry into the sufficiency of the affidavits as filed will satisfy defendants' rights. *United States* v. *Partin*, 312 F. Supp. 1355, 1361 (E.D. La. 1970).

II

When presented with an affidavit of prejudice made pursuant to § 144, a court may not pass upon the truth or falsity of the allegations, but must accept them as true for the purpose of determining the legal sufficiency of the affidavit. See *Berger* v. *United States*, 255 U.S. 22 (1921); *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913); and *Korer* v. *Hoffman*, 212 F.2d 211 (7th Cir. 1954).[2] "In the last analysis, the statute involved is not concerned with the actual state of mind of the judge or litigant but only with what the latter is willing to incorporate in an affidavit and counsel to indorse." *Johnson* v. *United States*, 35 F.2d 355, 357 (W.D. Wash. 1929). The mere filing of an affidavit of prejudice does not automatically disqualify a judge, *United States* v. *Gilboy*, 162 F. Supp. 384, 388 (M.D. Pa. 1958), but the judge must pass upon the legal sufficiency of the facts well-pleaded. See *Green* v. *Murphy*, 259 F.2d 591,

[2] Nevertheless, the facts alleged should be analyzed in context. See, Tenants & Owners in Opp. to R. v. U.S. Dept. of HUD, 338 F. Supp. 29 (N.D. Cal. 1972).

593 (2d Cir. 1958); *Eisler* v. *United States,* 170 F.2d 273, 278 (D.C. Cir. 1948). While factual allegations may not be controverted, the affidavit itself must be strictly construed. *See, e.g., United States* v. *Gilboy, supra,* 162 F. Supp.; *Sanders* v. *Allen,* 58 F. Supp. 417, 420 (S.D. Cal. 1944). The judge is presumed impartial. *Beland* v. *United States,* 117 F.2d 958, 960 (5th Cir.) cert. denied 313 U.S. 585 (1941). It must state facts as opposed to conclusions and generalities, *Simmons* v. *United States,* 302 F.2d 71, 76 (3d Cir. 1962), *Inland Freight Lines* v. *United States,* 202 F.2d 169, 171 (10th Cir. 1953), *Boyance* v. *United States,* 275 F. Supp. 772, 774 (E.D. Pa. 1967), and while the information and belief of the affiant as to the truth of the allegations are sufficient, *Berger* v. *United States, supra,* 255 U.S. at 34, mere rumors and gossip are not enough, *Id.* at 33. The identifying facts of time, place, persons, occasion and circumstances must be set forth, *Johnson* v. *United States, supra,* 35 F.2d at 357, with at least that degree of particularity one would expect to find in a bill of particulars. See *Morse* v. *Lewis,* 54 F.2d 1027, 1032 (4th Cir. 1932), *United States* v. *Gilboy, supra,* 162 F. Supp. at 392-393.

In assessing sufficiency of the facts alleged by affidavit, decisions have emphasized that any bias must be personal, that is, have its origin "in sources beyond the four corners of the courtroom." *In Re Federal Facilities Realty Company,* 140 F. Supp. 522, 526 (N.D. Ill. 1956). "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 583 (1966).

In *Hanger* v. *United States,* 398 F.2d 91 (8th Cir. 1968), Judge Meredith of the Eastern District of Missouri refused to disqualify himself from the retrial of a criminal case where the defendant's affidavit of prejudice alleged that at sentencing following the first trial, the judge expressed his belief in the defendants' guilt and described them as de-

serving severe punishment. The Eighth Circuit Court of Appeals found no error in that decision noting that the judge's opinions derived from proceedings had before him and they did not constitute the personal bias contemplated by § 144. And in *United States* v. *Dichiarinte,* 445 F.2d 126, 132-33 (7th Cir. 1971), the court held: "The fact that the judge might have formed an opinion concerning the guilt or innocence of the defendant from the evidence presented at an earlier trial involving the same person is not the kind of bias or prejudice which requires disqualification." (citations omitted).

In a case that bears some striking similarities to the action at bar, *Wolfson* v. *Palmieri,* 396 F.2d 121 (2d Cir. 1968), the Second Circuit reaffirmed the principle that the alleged prejudice, no matter how demonstrated, must be personal as opposed to judicial. There Judge Palmieri was assigned, apparently by special assignment, the trial of a criminal indictment, and within a few days, the trial of a second related indictment. Following their conviction in the first case, the two defendants charged in both indictments moved to disqualify Judge Palmieri from the second trial. The motion followed appeal but preceded sentencing. Defendants objected to Judge Palmieri's continuation in the case (1) since it was closely related to the earlier indictment, (2) because of comments and rulings made by the judge at the prior trial, (3) because of pretrial rulings, and (4) because one of the judge's former law clerks was an assistant prosecutor and the defendants intended to claim prosecutorial misconduct. The Court of Appeals found nothing to indicate disqualifying prejudice and adjudged the § 455 claim regarding the former clerk without merit. The Second Circuit has also ruled that it is not improper for the same judge to sit at the trials of co-conspirators tried separately. *United States* v. *DiLorenzo,* 429 F.2d 216, 220-21 (2d Cir. 1970) cert. denied 402 U.S. 950 (1971). See also, *United States* v. *Beneke,* 449 F.2d 1259 (8th Cir. 1971).

In this Circuit the rule is equally well settled. The Court of Appeals has stated in *Hurd* v. *Letts*, 152 F.2d 121 (D.C. Cir. 1945) and *Eisler* v. *United States, supra*, 170 F.2d, and more recently in *Tynan* v. *U. S.*, 376 F.2d 761 (D.C. Cir.) cert. denied 389 U.S. 845 (1967) and *Brotherhood of Locomotive Firemen and Engineers* v. *Bangor & Aroostook R. Co.*, 380 F.2d 570 (D.C. Cir. 1967) that bias or prejudice spoken of by § 144 must have originated from extrajudicial sources, and must bear directly on the then current proceeding. In the *Tynan* case, captioned below as *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.D.C. 1965) defendant Hanrahan, upon remand of his case following conviction, moved to disqualify the trial judge from continuing further. The affidavit filed under § 144 alleged that the judge (1) had expressed at the bench an opinion that defendant was guilty, (2) had told the prosecutor he should bring witnesses to refute defendant's testimony, (3) had threatened at trial to lock up defendant if he did not plead guilty, (4) during the proceeding said he did not want defendant to get a reversal on a technicality, and (5) said that defendant had had more than his day in court. Although as a matter of fact, some of the allegations were untrue, the Court of Appeals agreed with the trial judge that the allegations at face value did not constitute grounds for disqualification since none suggested attitudes developed from sources other than court proceedings or evidence in the case.

Additional well-reasoned decisions treating this point include *Mirra* v. *United States*, 379 F.2d 782 (2d Cir. 1966) cert. denied 389 U.S. 1022 (1967); *Hodgdon* v. *United States*, 365 F.2d 679 (8th Cir. 1966) cert. denied 385 U.S. 1029 (1967); *Galarelli* v. *United States*, 260 F.2d 259 (1st Cir. 1958), cert. denied 359 U.S. 938 (1959); *United States* v. *Gilboy, supra*, 162 F. Supp.

Also applicable here is the corollary principle that prior judicial determinations and inferences drawn therefrom

are not grounds for recusal. In *United States* v. *Partin, supra,* 312 F. Supp., Chief Judge West noted at page 1358,

> Recusal cannot be based on the Court's rulings in other cases nor on remarks or findings pertaining specifically to the facts or law in other cases in which the defendant was involved but must instead be predicated on extrajudicial attitudes and conceptions formed outside the courtroom. Tynan v. United States, 126 U.S. App. D.C. 206, 376 F.2d 761, 164 (1967), cert. denied 389 U.S. 845, 88 St. Ct. 95, 19 L. Ed. 2d 111 (1967).
>
> Likewise inferences drawn from prior judicial determinations are insufficient grounds for recusal because it is the duty of the judge to rule upon issues of fact and law and questions of conduct which happen to form a part of the proceedings before him. In re Federal Facilities Realty Trust, 140 F. Supp. 522 (N.D. Ill. 1956); Barry v. Sigler, 373 F2d 835 (CA 8—1967); United States ex rel. Bennett v. Myers, 381 F.2d 814 (CA 3—1967).

In *Partin,* four of the five grounds for disqualification listed in the defendant's affidavit cited court rulings, one in the case then pending and the others in three unrelated and separate procedings in which the defendant was a party. In one civil action mentioned, for example, defendant claimed that "comments from the court to counsel for affiant [at a deposition hearing] are replete with threats of contempt, with imposition of the heaviest fines possible and that affiant showed contempt for the judicial process, engaged in insulting comments at his deposition, and purposeful evasions." *United States* v. *Partin, supra,* 312 F. Supp. at 1356-57. Partin also cited the action of Chief Judge West in recusing himself without an assignment of reasons, from another case in which he, Partin was one of the defendants. Accepting all allegations as true, the court found references to prior judicial acts and decisions irrelevant. See also *Maret* v. *United States,* 332 F. Supp. 324 (E.D. Mo. 1971).

In *United States* v. *Garrison,* 340 F. Supp. 952 (E.D. La. 1972), the defendant in a conspiracy to obstruct justice case

sought the disqualification of Judge Christenberry pursuant to § 144 on the ground that "the court launched a personal attack" on him when ruling at an evidentiary hearing in a prior unrelated case. In the prior case, defendant Garrison, as a prosecuting attorney, was pursuing the conviction of one Clay L. Shaw for conspiracy to kill President John F. Kennedy. Garrison alleged that in his ruling Judge Christenberry stated as follows:

> . . . that I wrongfully used certain esoteric methods to 'implant' an otherwise untrue story in the mind of a state witness, that our prosecution was conducted in bad faith and that my sole interest in the case was financial. *United States* v. *Garrison, supra,* 340 F. Supp. at 955.

The defendant continued,

> Feeling strongly in the matter, I caused to be issued a press release denouncing your honor's findings. . . .
>
> Given the personal character of the court's remarks in its opinion and my equally personal remarks in my press release, it is submitted that this court cannot sit in fair judgment of me. The bias of the court, conscious or otherwise, is patent.
>
> *United States* v. *Garrison, supra,* 340 F. Supp. at 955.

The court ruled that prior judicial rulings adverse to a current defendant or prior judicial exposure to a defendant do not constitute the bias or prejudice that make recusal appropriate.

A further application of the rule is found in *United States* v. *Bell,* 351 F.2d 868 (6th Cir. 1965) cert. denied 383 U.S. 947 (1965) where the affidavit of prejudice has substantial parallels to those at bar. There the defendant, Bell, was charged with jury tampering in connection with a prosecution against former Teamsters Union president, James R. Hoffa. The trial judge had presided over the grand jury investigation leading up to Bell's indictment, and although he voluntarily recused himself from the trial

of others similarly indicted by the same grand jury, he denied Bell's motion for disqualification. The Sixth Circuit Court of Appeals, which sustained Judge Gray in that ruling, classified the charges of bias and prejudice as follows:

> 1. A portion of the judge's charge to the grand jury which indicated that the judge had some general knowledge that the subject of jury tampering would be investigated by the grand jury; 2. A hearing, in which defendant was ordered to answer non-incriminating questions of the grand jury prior to his indictment; 3. The judge's hearing of evidence on pretrial motions in this case and three related cases and in disbarment proceedings in two other related matters; and 4. The judge's action in recusing himself from two related cases.
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> *United States* v. *Bell, supra,* 351 F.2d at 878.

General notice in the affidavit of the court's judicial contact with related proceedings and evidence, although extensive, did not provide a basis upon which to infer prejudice. The court found nothing in these circumstances to warrant disqualification.

III

The present affidavits share common statements and conclusions which, for convenience in analysis, may be divided into six categories: (1) the Court's actions and participation in other proceedings; (2) publicity attaching to the Court's past actions; (3) the Court's association with the Special Prosecutor; (4) a supposed prejudgment by the Court of an issue likely to arise in this case; (5) the Courts' special assignment of the case; and (6) the assertion that the Court has been represented in other matters by attorneys who appears in this case. The Court will consider each of these grounds in turn.

Under the first subject heading, actions and participation in other proceedings, defendants have noted an extensive variety of events. In both affidavits defendants

quote at length although not always in context,[3] from the record in *United States* v. *G. Gordon Liddy, et al.*, D.D.C., Crim. Case No. 1827-72 tried by the Court in January, 1973. The statements proffered as facts, claim that the Court expressed a belief that criminal liability extended beyond the seven persons there charged; regarded motivations of those defendants as a crucial issue in the case; questioned defendants entering guilty pleas and witnesses concerning their involvement and that of others; expressed disbelief at some of the answers given; read colloquy and testimony occurring out of the jury's presence to the jury; suggested persons whom the prosecutors might consider calling before the grand jury investigating "Watergate"; expressed the hope that the Senate Select Committee on Presidential Campaign Activitis would finally resolve matters treated in the case; used provisional maximum sentences to force the cooperation of convicted defendants in the case with investigating authorities; observed, following the statements of one defendant to the effect that others were involved in "Watergate," that it had done the right thing

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[3] An example is the quotation at page 12 of the joint affidavit and page 6 of defendant Strachan's affidavit attributed to the Court alleging a remark to defendant Liddy in October, 1973 that "you who are relatively low on the totem pole [are] sentenced to thirty years in prison and those that planned, organized and directed the clandestine operation could be walking the streets free today." As a matter of fact, the Court made no such statement to defendant Liddy. On October 16, 1973, there was a hearing on a motion by defendants Hunt, Barker, Sturgis, Gonzalez and Martinez for bail pending imposition of final sentences. Defendant Hunt's attorney argued that "there is an inequality or at least appearance of an inequality as between the circumstances of Mr. Hunt, Mr. McCord and Mr. Segretti." He then relied on a statement of Senator Talmadge at the Senate hearings that the persons who did the dirty work were in jail while the planners who also pleaded guilty were free on bond. The Court looked at the transcript of the hearing to examine Senator Talmadge's exact words and then *quoted* the words set forth in the affidavits. Senator Talmadge had directed these remarks at Hunt and the Court as no point adopted these words (Tr. 10/16/73, pages 25-26).

in asking questions at trial; and finally, presided at final sentencing despite the motion of some defendants for disqualification. The affidavits further comment upon the Court's acquaintance, via subsequent proceedings, with evidence potentially relevant to the instant case. The specific instances cited include Court custody of White House documents submitted by John W. Dean, III, copies of which were delivered to the Senate Select Committee on Presidential Campaign Activities and federal prosecutors by the Court; acceptance of a sealed packet from the Special Prosecutor said to contain evidence relating to defendant Strachan; a Court conference with columnist Jack Anderson following publication by Mr. Anderson of grand jury minutes;[4] Court examination of White House tape recordings produced in October, 1973, pursuant to grand jury subpoena; and examination by the Court of materials contained in a report of the June 5, 1972 grand jury filed March 1, 1973, and later forwarded to the House Judiciary Committee.[5] Mention is made as well of the fact that the

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[4] Although the decision here is not affected by the inaccuracy of this allegation, it should be clarified for the record that the Court has not at any time met with Mr. Anderson. The Court did meet with his attorneys on one occasion at which time the attorneys delivered to the Court copies of grand jury minutes that had come into Mr. Anderson's possession. Thereafter, publication of such minutes ceased. The several judges of this district, including the Court, later instructed the United States Attorney to commence an investigation into the "leak" of these transcripts.

[5] Defendant Strachan at page 4 of his motion suggests that the Court has weighed and ruled on materiality of evidence. He defines materiality as meaning that evidence has probative weight. The Court, however, in describing the content of the Grand Jury report sent to the House Committee, uses the term "material" in its normally understood sense, that is, as simply bearing a relation to questions or propositions at issue. It is distinguished from relevance, "the tendency of the evidence to establish a material proposition." McCormick on Evidence § 185 at 435 (1972 ed.). Nevertheless, however the Court's description be understood, it related to issues before the House Judiciary Committee, not issues before the Court in this case.

Court entered an order conferring immunity from prosecution under Title 18 U.S.C. § 6002 on defendant Strachan, compelling the defendant, over his objection, to testify before the Senate Watergate Committee; that the Court has conferred similar witness immunity upon other persons who may testify in this action; that the Court has received the guilty pleas of and will sentence three persons likely to testify herein; and that the Court has met privately on at least two occasions with members of the Watergate Special Prosecution Force.

Applying the standards set out in part II to these alleged facts, the conclusion is inescapable that defendants' affidavits are not sufficient. Every action, decision and comment of the court cited by defendants arose in the course of official judicial activity. Statements concerning the truth or falsity or completeness of testimony at the *Liddy* trial had their basis in the evidence adduced in court. They reflect, if anything, a judicial state of mind rather than a personal bias. An expressed belief that others might be involved, that a witness had not fully revealed facts known to him, that a defendant had not answered a question truthfully, that all pertinent facts had not been produced before the jury, that the Court had been right in asking questions and an expressed hope that other authorities might uncover all of the relevant facts, are matters that have their roots in the record then before the Court. Such is the case as well regarding encouragement that defendants, following conviction, cooperate with the grand jury and Senate Committee,[6] acquainting the jury with testi-

[6] Sentence imposition based in part upon a defendant's cooperation with the government is a "universally known possibility." United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972); United States v. Sclafani, 487 F.2d 245 (2d Cir.), cert. denied 94 S. Ct. 445 (1973). Indeed the American Bar Association has approved the practice of granting sentence concessions, in furtherance of the public interest in the effective administration of criminal justice, to a defendant who "has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution

mony initially taken out of its presence, and the Court's suggestion that certain persons be called before the grand jury as posible sources of additional information. If there be and indication of prejudice in such actions, and the Court perceives none, it is by no means personal as that term is used in § 144. The Court, for example, in suggesting grand jury witnesses for the government's consideration cited specific parts of the record which gave rise to the instance, notably the tape recorded newspaper interview of witness Alfred C. Baldwin produced *in camera* and the court testimony of witness Hugh Sloan. And the Court made it clear thta it was "not accusing any of these people of wrongdoing." Rather the intent there, as throughout the proceedings, was to ascertain the truth and protect the integrity of the judicial process. As Judge Merhige so aptly stated in denying a motion to disqualify him in *Bradley* v. *School Board of the City of Richmond, Virginia*, 324 F. Supp. 439

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of other offenders engaged in equally serious or more serious criminal conduct." American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty § 1.8 (a) (v) (Approved Draft 1968).

The use of the statutory procedure made available by Congress under 18 U.S.C. 4208(b) *automatically* provides for a tentative maximum sentence until the sentencing judge receives the detailed study and report submitted to him under that section's provisions and cannot be fairly said to show bias or to involve coercion of the defendants. Use of that section is routine and simply enables the judge to exercise his sentencing discretion by ensuring that he has access to the fullest information about the offenders. Nothing in Section 4208(b) was designed to limit the discretion of the trial judge to consider the degree of a defendant's cooperation or any other legitimate factor, in fixing his final sentence. On the contrary, one of the express purposes of the delayed sentencing provisions of the statute was to allow the judge to determine during the observation period, the prospects of the defendant's rehabilitation. See 104 Cong. Rec. 12392 (remarks of Congressman Celler).

It might be noted as well that the defendants testified before the Select Committee and grand jury under grants of immunity. Under the provisions of 18 U.S.C. § 6001, et. seq., they were legally obligated to appear and testify.

(E.D. Va. 1971), rev'd on other grounds 462 F.2d 1058 (4th Cir. 1972),

> Language to the effect that certain steps and litigation were taken by a party at the Court's suggestion is ambiguous. Indeed, the Courts often have a duty to raise matters sua sponte when evidence indicates that equity and justice require a law suit to take a particular turn. See, e.g., Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966). Courts have a duty in certain instances to question witnesses and on occasion to call impartial experts to testify as witnesses for the court. Normally these steps would not be construed as an indication of bias or prejudice on the part of the presiding judge for the reason that they are usualy taken on the basis of information obtained by the judge in the courtroom where it is the judge's duty to form opinions. See Baskin v. Brown, 174 F.2d 391, 394 (4th Cir. 1949).
>
> *Bradley* v. *School Board, supra,* 324 F. Supp. at 445.

The Court's contact with other proceedings during 1973 and to date cited by defendants' affidavits occurred pursuant to the Court's exercise of its office as Chief Judge charged with supervisory responsibilities over grand juries and the handling of various miscellaneous proceedings. Insofar as the allegations treat rulings on questions of law, such as defendant Strachan's reference to a grant of witness immunity before the Senate Select Committee, they are insufficient as a matter of law to show prejudice. Whether or not a defendant regards a judge's interpretation of law as adverse to him, the cases make it clear that bias may not be inferred therefrom.[7] Sentencing decisions also are rooted in law and subject to this same rule. De-

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[7] Immunity to defendant Strachan was granted at the behest of the Senate Committee; it was not an action initiated by the Court. If such an immunity application is in proper form, a judge is obliged to grant it. See Application of United States Senate Select Committee, 361 F. Supp. 1270 (D.D.C. 1973). In no sense could such an order be said to indicate bias for or against anyone.

fendants assume that sentencing of Messrs. Dean, Magruder and LaRue will post-date their trial, and further conclude that the Court's presence as presiding judge will affect the testimony of these men if called as witnesses. The assumption is dubious, and the conclusion fails to explain why, if the witnesses are likely to testify with sentencing in mind, a view the Court does not adopt, it will make any difference what judge presides at trial.

The Court's acquaintances with information perhaps pertinent to this case has in every instance flowed from court proceedings. There has not been, nor is there alleged to have been, any extrajudicial source. Although it does not bear on the decision here, defendants should be aware that the Court has not examined packets of information lodged under seal concerning Gordon Strachen and John Dean, nor has it read the White House documents submitted by Mr. Dean in May, 1973. Realizing that it probably has never seen or heard at least a large majority of the evidence that might be produced at trial, the Court has consciously avoided forming opinions based on the information that has come before it in various proceedings. The existence of such opinions, however, still would not constitute the personal bias or prejudice proscribed by § 144. Judges routinely pre-view evidence or information bearing on a case in other settings, with no thought of disqualification arising as a result. For example, in multi-defendant criminal cases, it is not unusual that one or more defendants enter guilty pleas just before trial and disclose to the trial judge the facts of their misconduct. Although other defendants are not heard at proceedings wherein voluntariness is assessed, and although the court may there become acquainted with evidence tending to incriminate remaining defendants, no one suggests that disqualification should follow.[8]

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[8] Defendants have cited two related cases in which Judge Hauk of the Central District of California recused himself *sua sponte* following motions in part because he felt that his participation in

Those meetings with the Special Prosecutor and his personnel that occurred in the absence of other attorneys were necessitated by the Court's duties relating to grand juries, and again fall into the category of judicial activity which cannot give rise to personal prejudice. Further, as already stated, these conferences did not involve discussions of evidence bearing on defendants' guilt or innocence.

The affidavits, in short, lack a recitation of facts or alleged facts sufficient to "fairly convince a sane and reasonable mind that the judge does in fact harbor the personal bias or prejudice contemplated by the statute." *United States* v. *Hanrahan, supra,* 248 F. Supp. at 475 citing *United States* v. *Hoffa,* 245 F. Supp. 772 (E.D. Tenn. 1965) and *Fieldcrest Dairies* v. *City of Chicago,* 27 F. Supp. 258 (N.D. Ill. 1939) rev'd on other grounds, 122 F.2d 132 (7th Cir. 1941), vacated 316 U.S. 168 (1942). Defendants do not, indeed cannot, cite any indication of prejudice or bias on the Court's

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the investigatory phase of the cases would help create "the *appearance* of *possible* personal bias." United States v. Zerilli, 328 F. Supp. 706, 708 (D.C. Cal. 1971) (emphasis in original). To suggest, however, as defendants do, that these two decisions establish the rule that "a judge must recuse himself if his judicial assistance in the investigation of a case has caused him to pre-view evidence involving the defendants," is to build a house upon sand. Judge Hauk emphasized that the application of disqualification law to his case was *sui generis,* that the motions were legally insufficient, and quoted at length from Judge Youngdahl of this court who stated in United States v. Quattrone, 149 F. Supp. 240, 242 (D.D.C. 1957), "The Court does not believe that any general principles can be laid down concerning the degree to which an appearance of bias, interest or improper motive must exist before voluntary disqualification becomes desirable in any particular case." United States v. Zarowitz, supra, 326 F. Supp. at 93 n. 6. What these cases do illustrate is the wisdom of having individual judges decide the question of their own disqualification in a given case. It may well be that introspection will dictate either recusal or non-recusal in circumstances where other judges would reach the opposite conclusion based on their necessarily incomplete knowledge of the situation. United States v. Bell, supra, 351 F.2d is a complete answer to defendants' reliance on Zerilli and Zarowitz.

part adverse to them. Their best effort consists of alleging a battery of facts from which it is hoped one could infer some bias favorable to the prosecution. Even, then, however, defendants have cited nothing to suggest that any such bias, which the Court assures them does not exist, is personal. The Court cannot in good conscience accept this as a ground for disqualification.

As a second reason for disqualification, defendants have cited public comment, both pro and con, concerning the Court's decisions in prior proceedings and have noted contacts with news representatives which include a 70th-year birthday party, interviews seeking biographical information and portrait sketches by news media artists. Defendants apparently draw from these circumstances a conclusion that the Court has developed a personal stake in the conviction of defendants at bar, and relies upon such convictions for some form of "vindication." Defendants conjecture on this point is wholly inappropriate. The Court feels no need for vindication of any sort and seeks none. The Court's sole interest here, as always, is a professional interest in the proper administration of justice. There is nothing in the alleged facts propounded by the defendants to reasonably support a contrary conclusion. In fact, their own reference to public reports and comment which both praise and assail the Court for the same action, reveals the fallacy of looking to public opinion for "vindication." Defendant's argument lacks any merit whatsoever.

Turning to the third item, a reference to the Court's having attended a dinner at which the Special Prosecutor was guest of honor and having been photographed with Mr. Jaworski,[9] the Court again finds no reasonable basis for defendants' conclusion that a disqualifying connection of some sort exists between judge and prosecutor. If such

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[9] Defendants do not allege as fact, although they cite newspaper reports that the Court and Special Prosecutor "bantered" about this case. The report in fact is untrue.

social contacts between judges and members of the bar were to form a basis for recusal, then judges would either become near social hermits or we would be left with a non-functioning judiciary.

The fourth category of allegations appearing in the affidavits also treats a single event: statements regarding fair trial made by the Court at the Circuit Judicial Conference in March of this year. Transcripts of the questions and answers, later televised, show that in response to the question, "is there any doubt in your mind about these men's [defendants at bar] abilities to get fair trials?" the Court stated, "I think they can get just as fair a trial in the District of Columbia as any federal court in the United States. I have no doubt about that. Thank you." When the subject was raised again, the Court responded, "Well, in my opinion, any defendant, any person who happens to be a defendant in this jurisdiction, in my opinion can get just as fair a trial here as any jurisdiction in the country." Fairly interpreted, these comments address the quality of the federal judiciary in the District of Columbia and do not concern changes of venue, let alone constitute a prejudgment on motions for change of venue which to date have not been filed. Even, however, construed in the light most favorable to defendants' conclusion, the reported statements reveal only a then current and general impression which existed, as is always the case, in the context of an assumption that an unbiased jury may be found in the district. Whenever such assumption proves incorrect, or appears likely to fail in a given case, the case may be transferred. Any motions for change of venue, as well as other motions that may be filed herein, will be decided on their merits.

The Court's assignment of this cause to itself for all purposes, the fifth area of concern to defendants, in no way displays an overweening interest on the Court's part. Under the local rules of this Court, "[i]f the Chief Judge

determines at the time an indictment is returned that the case will be protracted and that the expeditious and efficient disposition of the court's business requires assignment of the case on a non-random basis, he may specially assign the case to any active judge for all purposes." See, Local Rule 3-3(c). Such was the situation here. Furthermore, if the Chief Judge wishes to try cases without the burden of carrying a full calendar, an arrangement contemplated by the Local Rules of the Court, he must assign such cases to himself specially since he is not included in the random assignment program. Thus, in addition to the exercise of administrative and other duties, the Court assigned itself four protracted cases for trial during its tenure as Chief Judge. There is nothing unusual about this assignment, especially since it comports with the principles governing the assignment of related cases as stated in Local Rule 3-4(d). It is one dictated by the interest in judicial economy and order, and certainly not subject to the insinuations present in defendants' affidavits.

Finally, it is proposed that appearances by Mr. David Bress, attorney for defendant Mardian, in mandamus proceedings against this Court while United States Attorney some years ago, an appearance by Mr. John J. Wilson, attorney for defendant Haldeman, as amicus curiae before the Court of Appeals during proceedings involving a case tried by the Court, and an appearance by the Special Prosecutor in a recent mandamus proceeding against the Court, each constitute a relation or connection with parties or attorneys sufficient to render it improper for the Court to proceed herein. The argument is apparently a makeweight. Representation by Mr. Bress and the Special Prosecutor in mandamus proceedings was in reality on behalf of the government. The Court was a nominal respondent. It is common practice that when the Court of Appeals seeks an answer from respondents in a mandamus case pursuant to Rule 21, Federal Rules of Appellate Procedure, the party which prevailed below files a brief supporting the judge's

position. Such a practice does not, for example disqualify any judge so represented from hearing all further cases brought by the United States while the then incumbent United States Attorney remains in office. Since mid-1968, judges in this district have been nominally represented in mandamus cases on at least forty-five occasions.[10] The logic of defendants' arguments would again carry us to the point where few if any judges would be permitted to hear cases.

In the rare instances where neither party below supports the trial court's decision, the Court of Appeals may require the judge to enter an appearance on his own behalf or appoint an amicus to defend the judge's position. The latter procedure was adopted when the Court of Appeals by order of September 29, 1972, *sua sponte* appointed Mr. Wilson to argue in favor of a ruling by the Court in *United States* v. *Ammidown*, D.D.C., Crim. Case No. 72-1694. Although Mr. Wilson conferred with the Court about that case, he never represented the Court as contemplated by § 455 nor has he ever represented the Court in the matter at bar or any other proceedings to the Court's knowledge. These circumstances are wholly unlike anything appearing in *Texaco Co., Inc.* v. *Chandler*, 354 F.2d 655 (10th Cir. 1965) cert. denied 383 U.S. 936 (1966) and *Rapp* v. *Pan Dusen*, 353 F.2d 806 (3d Cir. 1965).

Just as statutory authority for disqualification is utterly lacking, so defendants' argument that due process requires recusal here is without merit. As the Special Prosecutor has indicated in his brief, the legal authorities cited in

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[10] Records in the United States Court of Appeals for this Circuit reveal that the following judges have been represented by the United States Attorney, District of Columbia Corporation Counsel, or other parties in mandamus procedings: Panel on Multidistrict Litigation, District Judge McGuire, Curran, Walsh, Sirica, Hart, Jones, Corcoran, Gasch, Smith, Robinson, Waddy, Gessell, Pratt, Green and Parker and the District Judges generally, and Magistrate Lawrence Margolis.

support of the contention all look to distinct situations. In *Offutt* v. *United States*, 348 U.S. 11 (1954) the Court ruled that a judge who was personally embroiled with defense counsel during a trial could not sit at the subsequent contempt proceeding. In *In re Murchison*, 349 U.S. 133 (1955), the Court ruled that it was a denial of due process for a judge to sit at a contempt proceeding where he had previously sat as the one-man grand jury permitted by state law. In *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971) the judge had been the target of a contemnor's insolence, and the Court ruled that "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." In *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57 (1972) the village mayor was disqualified to sit in a traffic case because a substantial portion of the village fund, for which he bore responsibility, was obtained through fines in the mayor's court. See also *Tumey* v. *Ohio*, 273 U.S. 510 (1927).[11]

IV

As a final consideration contributing to its decision, the Court cannot overlook the fact that it has an obligation to deny insufficient recusal motions. "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In Re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961). See also, *Tynan* v. *United States, supra*, 376 F.2d,

[11] Similarly, additional cases cited that discuss the appearance or substantial possibility of bias both suggest the need for each judge to follow his own conscience in considering the totality of the facts presented, and rest on distinguishing factors. In Public Utilities Commission v. Pollack, 343 U.S. 451 (1952), for example, Justice Frankfurter disqualified himself because his feelings were "strongly engaged as a victim of the practice" at issue and might well appear to govern his decision. In Whitaker v. McClean, 118 F.2d 596 (D.C. Cir. 1941), the judge's expression of hostility toward the defendant, apparently far in excess of anything justified by the record, created a disqualifying bias or at least appearance thereof.

Eisler v. *United States, supra,* 170 F.2d and *United States* v. *Caraway,* 483 F.2d 215, 219 (5th Cir. 1973) (dissenting judge declined to disqualify himself). In *Edwards* v. *United States,* 334 F.2d 360 (5th Cir. 1964) cert. denied 379 U.S. 1000 (1965), Judge Rives, although desirous of excusing himself from a hearing en banc, stated,

> After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that under the law, I have no choice in this case.
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> • • •
>
> In the absence of a valid legal reason, I have no right to disqualify myself and must sit.
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> *Edwards* v. *United States, supra,* 334 F.2d at 362 n. 2.

See also *Kelley* v. *Metropolitan County Board of Education,* 479 F.2d 810, 812 (6th Cir. 1973) (concerning opinion). As definitively stated by Justice Rehnquist in *Laird* v. *Tatum,* 409 U.S. 824 (1972).

> Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified.* (citations omitted).
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> *Laird* v. *Tatum, supra,* 409 U.S. at 837 (emphasis in original).

The Court has no hesitation in recusing itself when the circumstances warrant. As recently as last December, the Court voluntarily disqualified itself in the resentencing of defendant who was tried before the Court in 1971. Here, however, mindful of its duty and finding the affidavits insufficient as a matter of law, the Court must deny the motions.

So Ordered.

/s/ John J. Sirica
United States District Judge

April 30, 1974

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 74-1492

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson and MacKinnon, Circuit Judges.

ORDER

(Filed June 7, 1974)

One consideration of petitioners' petition for writ of mandamus or prohibition, and of the pleadings filed with respect thereto, it is

ORDERED by the Court *en banc* that the aforesaid petition for writ of mandamus or prohibtion is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Clerk

The Judges reserve the right to file opinions at a later date.

MACKINNON, *Circuit Judge:* I object to the foregoing order denying the petition in this *en banc* case without opinion and without allowing petitioners to argue the matter orally to this court. The five judges who join in the foregoing order completely deny petitioners a hearing in this court and then by a mere order without any written opinion, in effect deny petitioners their most fundamental rights.

The issues raised by petitioners are substantial. They were deprived of their right in the trial court to develop

evidence to support their allegations that the trial judge had acted in an accusatory manner, and it appears admitted on this record that the trial judge has prejudged their ability to obtain a fair trial in this district. The refusal of the majority even to answer these allegations operates, in effect, to ignore the evidence both of prejudgment and of the contacts between the trial judge and the prosecutors. The petitioners are entitled to have this evidence produced, *cf. Brady* v. *Maryland*, 373 U.S. 73 (1963), and they are entitled to have their case tried by a judge who has not stated in effect that he had prejudged a material issue.

I would remand to afford petitioners an evidentiary hearing but if I were required to act on the existing record I would grant the writ. I will file a written opinion as soon as possible.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Criminal Case No. 74-110

UNITED STATES OF AMERICA, Plaintiff,

v.

JOHN N. MITCHELL, ET AL., Defendants.

JOINT AFFIDAVIT OF DEFENDANTS MITCHELL, EHRLICHMAN AND COLSON IN SUPPORT OF THEIR MOTION TO DISQUALIFY THE HONORABLE JOHN J. SIRICA

1. Each of the affiants is a defendant in the above-captioned case presently before the Honorable John J. Sirica. Each affiant bases this affidavit upon either personal knowledge or information and belief. Each submits this affidavit in support of the joint application and motion requesting that the Honorable John J. Sirica be recused from proceeding further as Judge in this case.

2. Each of the affiants has concluded, on the basis of the facts and reasons set forth herein, that Judge Sirica

possesses a personal bias and preconception in favor of the prosecution that will make it impossible for him to preside over further pre-trial proceedings or at trial in this case in a manner which will ensure both the substance and the appearance of impartial justice as required by law and by fundamental concepts of due process.

3. Each of the affiants has further concluded that Judge Sirica's conduct of the trial of the original seven Watergate defendants (*United States* v. *Liddy*, Criminal No. 1827-72) and his actions in supervising the Grand Jury investigation of this matter over a period of more than twenty-one months represent a merging of the prosecutorial and judicial functions which, while not necessarily improper in itself, makes it inappropriate for him to preside over the impartial determination of guilt or innocence of the defendants in this case.

Affiants have further concluded that Judge Sirica has a personal interest in this case. Establishment of the conspiracy charged in the indictment may be viewed as vindicating Judge Sirica's earlier conduct, which he justified publicly on the ground that it was necessary in order to expose the involvement of higher officials. It is therefore inappropriate for him to continue to preside over the trial of those alleged to be the "higher officials" he sought to expose.

Finally, affiants believe that the representation of Judge Sirica by the Watergate Special Prosecutor in a recent mandamus proceeding in a related case requires disqualification here.

3. Judge Sirica has lived with the Watergate investigation and the June 1972 Grand Jury for nearly two years. In supervising the Grand Jury investigation, he has heard evidence and has ruled on various applications for witness immunity and for subpoenaes, including of course the extended dispute over the Grand Jury's subpoena of White House tapes.

When the Grand Jury handed down its first Watergate indictments in September 1972, Judge Sirica eschewed the normal random assignment system and assigned the case specially to himself for trial. He presided over a three week trial in that case, often injecting himself into the proceedings with the zeal of a prosecutor. Over the objection of the convicted defendants who moved to disqualify him, Judge Sirica continued to preside during sentencing.

Throughout this period, Judge Sirica expressed the belief that criminal responsibility extended beyond the convicted defendants to higher officials in the Committee to Re-elect the President and in the White House. He urged that the investigation continue, and imposed conditional maximum sentences designed to pressure the convicted defendants into cooperating with further investigations by the Senate and the Grand Jury.

We are now well down the road which Judge Sirica helped to pave. Indictments have been brought against affiants by the same Grand Jury which has been under Judge Sirica's continuous supervision and which indicted the first seven defendents whom he tried. Once again Judge Sirica has assigned the case specially to himself for trial.

4. Over the course of his long involvement in the Watergate case, Judge Sirica has aligned himself with the prosecution and involved himself in the investigation. He has expressed the belief that higher officials were involved in the Watergate matter.

(a) At the 1973 trial, Judge Sirica interrupted the opening statement of Henry Rothblatt, counsel for four of the defendants, and evidenced his interest in going beyond the guilt of innocence of the defendants before him to determine who else might have been involved:

> "Of course the Jury is going to want to know why the men went in there. Let's get down to the details and find out why they went in there if you have some evidence as to that. That is one of the crucial issues

in the case. Who paid them? Did they get any money to go in there? Was it purely for political espionage? What was the purpose?" (Tr. 88).

(b) Judge Sirica's zeal for investigative matters beyond the scope of the criminal trial at hand was again evident in his questioning when Eugenio Martinez entered his guilty plea:

"JUDGE SIRICA: I want you to start from the beginning and I want you to tell me how you got into this conspiracy, how did it happen that you got involved?

• • •

"JUDGE SIRICA: Tell me in your own words what you did, how did you get mixed up?

"MARTINEZ: I believe the facts that you have read in the charges are true and are just to the truth.

"JUDGE SIRICA: That is a blanket answer. I want to know specifics.

"MARTINEZ: I am sorry.

"JUDGE SIRICA: I want specific answers to my questions. I am not satisfied.

"MARTINEZ: Your Honor asked me questions——

"JUDGE SIRICA: —I will ask you questions. When was a suggestion first made to you, if a suggestion was made, that they wanted you or whoever might have talked to you, Mr. Hunt or Mr. Barker or anybody else, to come up here and go into the Democratic Headquarters or the McGovern Headquarters? When did you first learn about that?

• • •

"JUDGE SIRICA: Were you doing this for nothing or were you getting paid?

"MARTINEZ: No, I did not get paid, Your Honor, for my services.

"JUDGE SIRICA: You didn't get any money. Did Mr. Barker give you money at all?

"MARTINEZ: For expenses.

"JUDGE SIRICA: How much did he give you?

"MARTINEZ: Maybe $400, $500, something like that in expenses.

"JUDGE SIRICA: Who paid for your plane fare up here, if you came by plane?

"MARTINEZ: Mr. Barker.
"JUDGE SIRICA: Who paid for your hotel bills?
"MARTINEZ: Mr. Barker.
"JUDGE SIRICA: Who paid for your meals and things like that?
"MARTINEZ: I believe Mr. Barker. I never saw him pay. I believe Mr. Barker did.

• • •

"JUDGE SIRICA: Who was handling the money in this situation? Who was the money man, so to speak?" (Tr. 393-396).

• • •

"JUDGE SIRICA: Do you know of anybody else that was involved in the breaking and entering into the Democratic Headquarters either by being personally present or by being somewhere else? Do you know of anybody else, no matter who it might be?" (Tr. 399).

A similar line of interrogation was pursued by Judge Sirica when Bernard Barker entered his guilty plea:

"JUDGE SIRICA: Did you pay them from time to time for the work that they did?

• • •

"JUDGE SIRICA: Where did you get the money from?
"BARKER: This money came to me in a closed envelope by mail. I cannot make a definite statement as to who sent it to me. It was very small amounts.
"JUDGE SIRICA: Are you asking the Court to believe the money come in cash, I take it, in an envelope and you dont' know who sent it to you?
"BARKER: I have an idea it was sent by those persons involved in this operation and that it was sent for a purpose of paying those expenses. We are not rich people, we could not afford that.
"JUDGE SIRICA: Who are those persons that you refer to?

• • •

"JUDGE SIRICA: Who are the other people involved?

• • •

"JUDGE SIRICA: He is the only one that is involved so far as you know?

• • •

"JUDGE SIRICA: I want to know if you will tell me where did this money come from that was traced to your account—the trust account or your personal account—where did you get this money, these hundred dollar bills that were floating around like coupons?" (Tr. 412-414).

• • •

"JUDGE SIRICA: Wait a minute. An amount of money came to you with orders to change what?

"BARKER: To make them cash, sir.

"JUDGE SIRICA: Who gave you the orders?

"BARKER: I said they arrived by mail.

"JUDGE SIRICA: When did they arrive by mail?

"BARKER: Oh, about, I would say three or four days before I presented them to my bank for collection. I would refer to that date to Your Honor.

"JUDGE SIRICA: You presented what to your bank?

"BARKER: I passed this through my bank account.

"JUDGE SIRICA: You mean the $25,000 check?

"BARKER: And the $89,000 check—four checks that apparently came from Mexico.

"JUDGE SIRICA: Didn't you think it was strange that amount of money coming through the mail without being registered or anything?

• • •

"JUDGE SIRICA: How much of that money did you actually use? We are talking about a lot of money. We are talking about $25,000 which was converted into cash, wasn't it?

• • •

"JUDGE SIRICA: How was the check made out, who was the payor of the check and the payee?

• • •

"JUDGE SIRICA: Look, Mr. Barkér, it takes quite a lot of money to stop at a place I imagine like the Watergate, although I have never stopped there, and it takes money to feed people, it takes money to feed people, it takes money to travel by airplane from Miami and back, hotels and so forth. Where did you get that money that you used to pay those men's expenses?

"BARKER: Your Honor, I got that money in the mail in a blank envelope.

"JUDGE SIRICAS I am sorry, I don't believe you." (Tr. 415-417).

(c) Judge Sirica interrogated Alfred Baldwin, a prosecution witness, again in an effort to investigate matters beyond the guilt or innocence of the defendants before him:

"JUDGE SIRICA: All right. Now, when you went to the Committee to Re-elect the President to deliver this envelope with a name of the person to whom you were supposed to give it, to whom did you give the envelope?

"BALDWIN: The guard at the Committee—one of the guards.

"JUDGE SIRICA: Had you ever seen that guard before?

"BALDWIN: He has been on the door before, I believed he worked for Mr. McCord.

"JUDGE SIRICA: What was his name?

"BALDWIN: I don't know his name.

"JUDGE SIRICA: Here you are, a former FBI agent, you know this log was very important?

"BALDWIN: That is correct.

"JUDGE SIRICA: You want the jury to believe that you gave it to a guard, is that your testimony?

"BALDWIN: Could I explain something——

"JUDGE SIRICA: —Answer my question, first. Do you want the Court and the jury to believe that you gave it to some guard who you hardly knew?

"BALDWIN: I did give it to a guard.

"JUDGE SIRICA: And told him to deliver it to this party and you let it rest there?" (Tr. 1150C-1150D).

(d) At one point during the questioning of the defendants in connection with their guilty plea, Judge Sirica warned "Don't pull any punches—you give me straight answers. Any (other) people involved, * * * I want to know it and the Grand Jury wants to know it." (Tr. 386).

(e) Judge Sirica questioned the veracity of Hugh Sloan's testimony denying knowledge of involvement of higher officials, just as he had questioned similar denials by the defendants:

"I have great doubts whether Mr. Sloan has told us the entire truth in this case." (Tr. 2/2/73, page 32).

(f) Toward the close of the 1973 trial, Judge Sirica stated that the jury was free to decide that higher officials were involved:

> "[T]he jury are able to determine in their own mind if there are any others—other persons—involved even if they are not on trial, they don't have to close their ears to the testimony." (Tr. 1995).

(g) At the conclusion of the 1973 trial Judge Sirica made explicit what had previously been implicit in his actions—in spite of the fact that the defendants before him had been tried and convicted, Judge Sirica was looking ahead to future indictments and trials of persons of higher responsibility who he felt were involved:

> "I have not been satisfied and I am still not satisfied that all the pertinent facts that might be available • • • have been produced before an American jury. I am not satisfied that somebody else doesn't know anything about what the $199,000 that Mr. Liddy got was used for.
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> "I would hope, frankly, not only as a judge but as a citizen of a great country and one of the millions of Americans who are looking for certain answers, I will hope that the Senate Committee is granted the power by Congress by a broad enough resolution to try to get to the bottom of what happened in this case." (Tr. 2/2/73, page 35).

(h) Having utilized his courtroom as an investigating adjunct to the Grand Jury, Judge Sirica took the extraordinary step of drawing up a list of six Administration officials whom he felt the prosecutors ought to put under oath in the Grand Jury room. Affiants lack specific knowledge of the names included in that list since Judge Sirica ordered it held under seal, but it is reasonable to assume that the names of one or more of the defendants in this case appear on the list.

(i) In an admitted effort to coerce testimony from the convicted defendants in the Grand Jury and before the Senate investigating committee which would implicate

higher officials, Judge Sirica imposed conditional maximum sentences. This procedure was criticized by the American Civil Liberties Union as raising "serious civil liberties problems." A.C.L.U., "Watergate and Civil Liberties," page 14. Chesterfield Smith, president of the American Bar Association, observed, "We must be concerned about a federal judge—no matter how worthy his motives or how much we may applaud his results—using the criminal sentencing process as a means and tool for further criminal investigation of others." "Sirica deserves to be censured for becoming the prosecutor himself," noted Monroe Freedman, Dean of Hofstra University Law School. *Time,* January 8, 1974, page 18.

(j) Judge Sirica's personal belief that persons were involved other than the defendants before him, was expressed in the following remark to Mr. Liddy:

> "Does it not strike you as a strange commentary on justice that you are relatively low on the totem pole here to be sentenced to thirty years in prison and those that planned, organized and directed the clandestine organization could be walking on the streets free today?" (Tr. 10/16/73, page 26).

Affiants do not intend to imply that Judge Sirica's conduct in the 1973 trial and subsequent proceedings was improper, but submit that his prior involvement in the investigation and prosecution makes it wholly inappropriate for him to preside in this case.

5. In the course of supervising the Grand Jury investigation and of conducting the 1973 Watergate trial, Judge Sirica has been exposed to evidence bearing on affiants' guilt or innocence, under circumstances in which affiants had no opportunity to confront the evidence or to cross-examine. Affiants lack sufficient knowledge to state with particularity all such instances of extra-judicial access to Grand Jury evidence, but state the following:

(a) On May 4, 1973, John Dean removed certain documents from the White House and placed them in a

safe deposit box, giving the key to Judge Sirica. According to Mr. Dean, the documents contained circumstantial evidence implicating defendants Haldeman and Ehrlichman. Judge Sirica accepted custody of the documents, and ordered copies to be delivered to the Senate investigating committee and to the prosecutors. He kept the originals himself.

(b) Before ruling on the Grand Jury's subpoena of White House tapes, Judge Sirica listened to all of the tapes produced by the White House. This included the tapes of June 20, 1972, June 30, 1972, September 15, 1972, March 13, 1973, March 21, 1973, March 22, 1973 and April 15, 1973, all of which contain evidence concerning one or more of the defendants in this case.

(c) On March 1, 1974 the Grand Jury forwarded to Judge Sirica a secret report and a briefcase of supporting evidence concerning President Nixon's involvement in the alleged Watergate cover-up. In his order of March 18 approving the Grand Jury's request that the material be forwarded to the House of Representatives, Judge Sirica admitted that he had examined the evidence furnished by the Grand Jury. Unquestionably, some of the evidence reviewed by Judge Sirica related to one or more of the defendants in this case.

(d) According to newspaper reports dated June 19, 1973 and July 18, 1973, Judge Sirica met privately on at least two occasions with members of the Watergate Special Prosecution Force. The details of these and any other unreported private meetings have not been made public; affiants are therefore unable to state with particularity the number of such meetings which have taken place, or the dates, participants, purposes or susbtance thereof.

Affiants do not intend to intimate that the above conduct by Judge Sirica was improper in the context in which it occurred but, as in the case of the conduct described in paragraph 4 above, Judge Sirica's prior contact with material

in this case makes it wholy inappropriate for him to continue to preside.

6. Judge Sirica has previously accepted guilty pleas from three important witneses in this case—John Dean, Jeb Stuart Magruder, and Fred LaRue—and has deferred sentencing. Unless he is disqualified, Judge Sirica's presence as presiding judge may well affect the testimony of these witnesses, whose liberty depends on his exercise of discretion at sentencing.

7. On March 18, 1974 Judge Sirica entered an order granting the Grand Jury's request that certain evidentiary materials be forwarded to the House of Representatives. Defendants Haldeman and Strachan petitioned the Court of Appeals for a writ of mandamus or prohibition prohibiting Judge Sirica from taking this action. Their petition was opposed by the Watergate Special Prosecutor appearing on behalf of Judge Sirica. Affiants submit that Judge Sirica cannot properly continue to preside as an impartial arbiter in a case in which counsel for one of the parties has represented the Judge in a highly controversial mandamus proceeding separate from the present case but involving closely related issues.

8. Throughout the 1973 Watergate trial, Judge Sirica justified his active interrogation of witneses on the ground that neither the prosecution nor the defense was eliciting the full facts concerning involvement of higher officials.

The following colloquy occurred during Judge Sirica's questioning of the defendants in connection with their guilty plea:

> JUDGE SIRICA: I want you to be straightforward with these questions. I want you to come forward in a truthful manner, I don't care who they might hurt or help, it doesn't make any difference to this Court who you might mention or who it hurts or helps, just so you don't involve any innocent people.
>
> • • •

"JUDGE SIRICA: Any people involved that shouldn't be involved, I want to know it and the Grand Jury will want to know it." (Tr. 386).

When the prosecutor expressed concern over newspaper speculation generated by Judge Siricas' intimations that others were involved, he responded:

"The truth will come out. I hope it will come out in this case. And if I think I should ask questions to bring out additional facts that haven't been developed, I wil continue to do so." (Tr. 1399).

Judge Sirica's interogation of Hugh Sloan plainly revealed the Judge's belief that the involvement of higher officials was being concealed. Sloan's testimony was elicited out of the jury's presence, but was later read to the jury in open court. When defense counsel objected that this procedure placed unfair emphasis on Mr. Sloans' testimony and on Judge Sirica's apparent skepticism as to Sloan's veracity, the Judge replied:

"I think there is a responsibility on a judge too, to see that all the facts are developed that are pertinent to the issues in a case. Because they have not been developed, because I thought they had not been developed insofar as Mr. Sloan is concerned, I am exercising my prerogative of doing it myself in the interest of seeing that the jury gets all the facts." Tr. 1723).

Subsequently Judge Sirica confirmed that he did not believe Mr. Sloan's denials of knowledge as to involvement of higher officials:

"I don't think a federal judge particularly should sit on the bench in a case like this with great public interest in it, with millions of people asking different questions and trying to find the answers * * * I don't think we should sit up here like nincompoops * * * and not ask any questions. * * * I have great doubts whether Mr. Sloan has told us the entire truth in this case * * * I felt that neither one of you, the government or the defense, asked Mr. Sloan any questions." (Tr. 2/2/73, page 32).

Judge Sirica made no effort to conceal his belief that the testimony at trial had not exposed the full extent of criminal responsibility in connection with the Watergate matter:

> "I have not been satisfied and I am still not satisfied that all the pertinent facts that might be available * * * have been produced before an American jury. I am not satisfied that somebody else doesn't know anything about what the $199,000 that Mr. Liddy got was used for." (Tr. 2/2/73, page 35).

When he received and made public James McCord's letter suggesting that others were indeed involved, Judge Sirica considered his earlier conduct vindicated:

> "It convinced me I'd done exactly the right thing in asking all those questions." (Quoted in Appendix B at page 13).

Affiants believe that Judge Sirica has a substantial interest in the outcome of this case, in that the establishment of the conspiracy alleged in the indictment will be viewed as further vindication of his earlier conduct, and of his much-publicized preconception that higher officials were involved in criminal conduct.

9. As a result of the extensive press and media coverage of Judge Sirica's activities in connection with the supervision of the Grand Jury and the trial of the 1973 Watergate case, Judge Sirica's public image and reputation have become inextricably intertwined with the prosecution of the Watergate matter, a fact of which he is not unaware.[1] As a result, he has a personal interest in the outcome of this case which affiants believe will make it impossible for

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[1] A small but representative sampling of the publicity accorded Judge Sirica is attached as Appendix A.

him to conduct their trial in the required atmosphere of judicial impartiality. That Judge Sirica is not oblivious to his public press image is evident from his cooperation with Time Magazine's David Beckwith who spent two weeks in constant company of Judge Sirica as background for *Time's* cover story of January 7, 1974 featuring Judge Sirica as " "Man of the Year."[2] During the 1973 Watergate trial, Judge Sirica invited media sketch artists into his chambers. Recently Judge Sirica was guest of honor at a party given by the press honoring him on his 70th birthday. In the course of that party, Judge Sirica conduced interviews with reporters in which he made statements concerning this case. In a televised interview Judge Sirica was quoted as saying he was confident that affiants could get as fair a trial in the District of Columbia as anywhere in the United States, thus prejudging any motion for change of venue which affiants may make.

10. On the basis of the facts and reasons set forth above, each of the affiants has concluded that Judge Sirica possesses such bias in favor of the prosecution, has been so closely connected with the Watergate investigation and prosecution leading up to the present indictments, and has such a personal interest in the outcome of this case, that he will be unable to provide affiants with a fair trial which serves both the substance and the appearance of justice.

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[2] A copy of the cover story is attached as Appendix B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 74-110

AFFIDAVIT

KENNETH L. ADAMS, being duly sworn, deposes and says:

1. I am an associate of Sidney Dickstein, Esq., counsel for defendant Charles W. Colson in the above-captioned case.

2. A search of the relevant court records has revealed that John J. Wilson, Esq., counsel for defendant Harry R. Haldeman, apeared as *amicus curiae* on behalf of Judge Sirica in *United States* v. *Ammidown*, ——F.2d ——, —— U.S. App. D.C. ——(11/16/73). Following an adverse ruling by the Court of Appeals Mr. Wilson, on behalf of Judge Sirica, requested a rehearing *en banc*. The matter is stil pending before the Court of Appeals.

3. Conversations with several members of the District of Columbia bar have revealed that Judge Sirica and John J. Wilson, Esq. enjoy a close friendship of long duration, extending over a forty year period from the time of their service together in the Office of the United States Attorney for the District of Columbia.

4. A search of the relevant court records has revealed that David G. Bress, Esq., counsel for defendant Robert C. Mardian, represented Judge Sirica in the following mandamus proceedings: *Illinois Scientific Developments, Inc.* v. *Sirica*, 410 F.2d 237, 133 U.S. App. D.C. 249 (1968); *Ross* v. *Sirica*, 380 F.2d 557, 127 U.S. App. D.C. 10 (1967); *Filmon Process Corp.* v. *Sirica*, 379 F.2d 449, 126 U.S. App. D.C. 395 (1967); *Advisors of Washington, D.C.* v. *Sirica*, C.A. 68-735 (unreported); *Frishman* v. *Sirica*, C.A. 64-2994 (unreported); and *Sutherland* v. *Sirica*, C.A. 67-111 (unreported).

/s/ Kenneth L. Adams

THE EVENING STAR AND DAILY NEWS

Washington, D. C., Wednesday, January 24, 1973

HIGHER-UP BUG LINKS HINTED

By Barry Kalk and Joy Aschenbach
Star-News Staff Writers

Testimony about the financing of the Watergate bugging yesterday touched two of the highest Nixon re-elected officials John N. Mitchell and Maurice Stans but stopped short of implicating them in the plot.

True to form, the testimony did nothing, however, to dispel the notion that campaign "higher ups" knew about the plot. Instead, the statements only gave rise to more questions and more speculation.

And had not Chief Judge John J. Sirica of U.S. District Court once again intervened in the questioning, even the meager facts that did emerge might have remained buried.

The possibility of any further revelations was made even more remote yesterday as all four campaign officials testifying for the government, denied any knowledge of the plot and failed to implicate anyone new.

Mitchell, Stans Named

Mitchell was director of the Committee for the Re-election of the President at the time of the bugging and Stans director of the CRP's finance arm.

Both have been linked in news reports with a cash fund totaling hundreds of thousands of dollars, from which the bugging and an alleged broader political espionage campaign are said to have been financed.

The government says the bugging was financed with committee cash, and several CRP officials confirmed yesterday that this money was given to G. Gordon Liddy, who

served as general counsel to both the CRP and its finance arm.

Both Mitchell and Stans have vigorously denied knowledge of any illegal activity. Their denials, however, can now be balanced against two statements made in court yesterday by Hugh W. Sloan Jr., former treasurer for the finance committee.

Made a Mistake

Sloan said he asked Stans at one point to verify that Jeb S. Magruder, deputy campaign director, had the power to authorize the disbursement of large amounts of cash. He said Stans in turn asked Mitchell, and the two men told Sloan that Magruder was acting within his authority.

Sloan said he sought this verification after Liddy, one of the defendants in the case, asked for $33,000 of the $250,000 Magruder had earlier allotted him for political intelligence work.

Sloan also testified that he destroyed the detailed records of the specific cash disbursements made from the fund from which Liddy was paid.

The afternoon of June 17—the day five men were arrested inside Democratic National Committee headquarters—Sloan said, he saw Liddy in the CRP offices. Under questioning by the government, Sloan said Liddy told him: "My boys got caught last night. I make a mistake. I used somebody from here, which I said I'd never do. I'm afraid I'm going to lose my job.

Under close questioning by Sirica, however, Sloan changed that quote somewhat to read: ". . . I made a mistake by using someone from here, which I told them I'd never do . . ."

These statements raise the following questions:

When Sloan went to Stans, and Stans to Mitchell, did the two directors ask how much money was involved at the moment, or to whom the money was going, or what the purpose was?

The government's statement and yesterday's testimony established that in December 1971, Magruder and Herbert L. Porter, scheduling director for the CRP, assigned Liddy to gather information on possible demonstrations and violence during the campaign and at the Republican National Convention. For this, they said, Liddy was allotted $250,000.

Both Magruder and Porter said that in making this assignment, they had nothing illegal in mind.

Some $235,000 of this allotment, those testifying agreed, was actually paid to Liddy, in cash, by Sloan himself and by Sloan through Porter. And Sloan said he took this money from sales in his office and that of Stans' secretary.

Porter said that by April,

THE SUNDAY STAR AND DAILY NEWS

Washington, D. C., January 28, 1973

JUDGE, OBSERVERS CITE HALF-ANSWERS IN WATERGATE TRIAL

By Barry Kalb and Joy Aschenbach
Star-News Staff Writers

"I think there is a responsibility on a judge to see that all the facts are developed that are pertinent to the issues in a case . . . Because I think that they have not yet been developed . . . I am exercising my prerogative of doing it myself."

So said Chief Judge John J. Sirica of U.S. District Court on Friday. Sirica, presiding in the Watergate break-

in and bugging trial, had interrupted the proceedings for the third time to declare publicly his doubt that the facts in the politically sensitive case were being fully elicited by the prosecution and defense.

Highly reliable sources have said the government does have information on the political aspects of the case that it has purposely not brought out in the trial.

Not an Inquisition

Prosecutors say privately that they don't feel this information is relevant—that they are conducting a criminal prosecution not a "political inquisition."

Because of this feeling, and because, reliable sources say, there are some facts the government simply does not know, the trial has brought forth a number of half-answers and hints that there is more under the surface.

Following are some points that are known and some unanswered questions.

The government has said, and officials of the Committee for the Re-Election of the President have testified, that in late December 1971, G. Gordon Liddy, newly named general counsel to the CRP, was assigned to develop information on possible violence during Republican campaign appearances and during the Republican National Campaign the following summer.

The implication of the testimony is that what became the Watergate affair began at this point as a legitimate enterprise.

However, there is some evidence—inconclusive at this point—that a political intelligence operation involving some of the defendants, in whatever form, was already in operation by the time Liddy was given his assignment.

The government has said, and CRP officials have testified, that Liddy was allotted $250,000 for his operations

from a cash fund kept in the offices of CRP's finance arm, and that he was actually given about $235,000 of this.

The implication of the testimony is that Liddy, on his own, subverted the use of this money to criminal ends, and that nobody else at CRP knew how the money was being used.

But the testimony has been full of unexplained hints that others knew as well, or at least tacitly authorized the criminal activities without knowing their knowing their exact nature.

Job Move Date

Asst. U.S. Atty. Earl J. Silbert said in his opening statement that Liddy went from a job as White House consultant to his new job as counsel for the CRP on Dec. 10, 1971.

Jeb. S. Magruder, deputy director of the CRP, testified that he had called John Dean III, counsel to the President, shortly before this asking Dean to recommend someone as fulltime counsel to the committee. Dean recommended Liddy, Magruder said.

Meanwhile, Magruder and Herbert L. Porter, CRP director of scheduling, testified that the two of them had been worrying about possible demonstrations and violence at campaign rallies and the upcoming national convention.

They decided, they said, that they needed some advance intelligence, and agreed that Liddy, with his FBI background, was the man for the job. They asked him to do it, they said, and he accepted.

The government's evidence seems to show that with the money Liddy was given for this legitimate operation, he recruited six other men—E. Howard Hunt Jr., James McCord Jr., Bernard L. Barker, Frank A. Sturgis, Virgilio R. Gonzalez and Eugenio R. Martinez—and launched the Watergate caper.

But there has been no word, on how Hunt—a close acquaintance of Liddy and fellow White House consultant—and McCord were actually drawn into the plot, and government sources admit that although they assume Liddy recruited the two, they have no firm evidence that this is the case.

Early Operation

Reliable sources have said that as early as the summer of 1971, while Hunt and Liddy were both still working as White House consultants, Hunt was engaged in another form of political intelligence—obtaining information on Sen. Edward M. Kennedy, D-Mass., then considered a potential Democratic opponent of President Nixon.

The only new details about the $250,000 cash fund—and they are few—were disclosed when the judge intervened to question one of the government's principal witnesses, Hugh W. Sloan Jr., former treasurer of the CRP's finance arm.

Sloan told the judge that he had paid Liddy $199,000 in cash on orders from Magruder, who was empowered by Maurice H. Stans, finance committee chairman, and John N. Mitchell, then director of the re-election committee, to make disbursements from the fund.

Beyond that, Sloan insisted he knew nothing. He, Magruder and Porter were never asked to reveal the original source of the secret cash fund, the names of any other officials who might have been authorized to disburse money from it, the names of those who were given money from it, the purposes for which it was used, and why records were kept and then destroyed.

Basically, the testimony of Magruder, Sloan and Porter served to disconnect anyone else from the Watergate bugging plot. All denied that they authorized the break-in and bugging or knew anything about it.

But all left the lingering impression, as Sirica pointed out, that they hadn't told all.

NEW YORK TIMES

February 1, 1973

WATERGATE CONVICTION

The conviction of two of the senior officials in President Nixon's campaign organization for criminal conspiracy, burglary and wiretapping of the Democratic National Committee's Watergate headquarters proves that this sinister operation was no trivial escapade by unimportant persons. It was part of a larger, far-flung, well-financed plan to use political espionage and sabotage techniques to disrupt and defeat the political opposition. The intrusion of these police state methods into domestic politics is without precedent and deserves the most thoroughgoing exposure and condemnation.

The White House has dissembled again and again in a frantic effort to divert the searchlight of public suspicion from its own responsibility for this ugly business. But thanks to the courage and tenacity of Chief Judge John J. Sirica of the United States District Court who presided at the Watergate trial, the public now has on record sworn testimony that former Attorney General John N. Mitchell, the President's campaign manager, and former Secretary of Commerce Maurice H. Stans, his chief money-raiser, personally approved the disbursement of $199,000 to one of the convicted defendants to carry out this espionage. Judge Sirica elicited that testimony from Hugh W. Sloan Jr., the former treasurer of the Committee for the Re-election of the President, after the prosecutor in the case had unconscionably failed to do so.

Mr. Sloan also testified that one of the convicted defendants told him after the police made the Watergate arrests: "My boys got caught last night. I made a mistake by using somebody from here, which I told them I would never do."

That testimony was not contradicted, but neither did Mr. Sloan explain who was meant by "them." It is a fair deduction that senior White House aides as well as Herbert W. Kalmbach, the President's personal lawyer, not only had knowledge of this repulsive operation but also planned it, recruited agents for it, and received their reports.

Dwight L. Chapin, President Nixon's appointments secretary, has been forced to resign because he has been publicly identified as the White House contact for one of the agents. But no one who knows the amiable and loyal Mr. Chapin believes that this young man is more than the "fall guy" for others more senior than himself in the White House apparatus who are still in office.

"All the facts have not been developed by either side," Judge Sirica observed last week to the lawyers for the prosecution and the defense. The indictments were drawn as narrowly as possible, and the Justice Department has been less than ardent in exploring the case.

It is clearly the duty of the Senate to go forward with its inquiry and make an unremitting effort to identify all of the higher-ups and all of the ramifications of this ruthless conspiracy to subvert the normal exercise of political freedom.

THE WASHINGTON STAR NEWS

February 2, 1973

CARL T. ROWAN

JUDGE SIRICA'S COURAGE WARMLY REASSURING

I don't know much about rules of evidence, so the appeals courts may overrule this column. But my admiration grows every day for the way Judge John J. Sirica is handling the Watergate bugging trial.

Here is a judge, known to be a Republican, presiding over a case that has to be an embarrassing to some very high-ranking Republicans. Here is a judge sitting on a case where, in effect, the Nixon administration is prosecuting itself. Here is a case where the prosecution doesn't bother to call some potentially key witnesses, where it stops questioning witnesses just when everyone is expecting the $199,000 question, and where convenient pleas of guilty by some and suddenly foggy memories by other obviously are designed to keep the jury and the public from ever knowing the whole truth.

Sirica could shroud himself in legalisms about court procedures, let the defense and the prosecution play out their little charade and pass it off as just another case where the smart operators frustrated justice.

But Sirica, chief judge of the U.S. District Court here, has made it abundantly clear that he isn't about to have his reputation tarnished by a sham court procedure.

So, when five of the defendants pleaded guilty to burglarizing and bugging Democratic party headquarters (and thus avoided having to talk about why and for whom they were working), Sirica called them to the bench and tried to exact the truth. As they feigned ignorance about almost everything the judge said to one: "I don't believe you."

Then along comes Gerald Alch, the attorney for James W. McCord Jr., former security coordinator for both the Republican National Committee and the Committee for the Re-election of the President. (McCord also was arrested inside Democratic headquarters.)

Alch had a novel bit of strategy. He told newsmen his defense would be that McCord had a right to break the law through burglary and bugging because he was under "duress," trying to prevent a larger crime—presumably, violence against the officials out campaigning in behalf of President Nixon.

That's a little like me arguing that I have a right to rob the U.S. Mint and spend the money for good causes, because if I don't this administration is going to spend it on foolish, destructive prjects. But it never occurred to me, that, however absurd the argument, Alch would be forbidden to use it.

But Sirica chewed out Alch, labeling his planned defense "ridiculous", and told him he wouldn't even instruct the jury to consider it.

Next comes the intriguing role and testimony of Hugh W. Sloan Jr., treasurer of the Committee for the Re-election of the President until he resigned hastily after the arrests were made in the Watergate.

Earl J. Silbert, assistant U.S. attorney and chief prosecutor in this trial, tells Sirica that "intensive" investigation had shown that "Sloan had no possible remote connection, direct or indirect" with the Watergate incident.

Well, the judge asked Sloan a few questions in the jury's absence and got some answers that makes one wonder if the prosecutor is the defense counsel. Sloan admitted that he turned over at least $199,000 in cash to defendant G. Gordon Liddy who, testimony indicates, was the quarterback and money man for the burglary-bugging operation. Sloan told the judge that he had verified with Maurice Stans, Nixon's campaign finance chairman, and with John Mitchell, the campaign chairman, that it was all right to turn the money over to Liddy. Sloan told the judge that he quit the Committee for the Re-election of the President because of the Watergate incident. At the time he quit, the explanation was that his wife was pregnant.

Mitchell quit as campaign chairman right after the Watergate arrests after his wife, Martha, put on a widely-publicized tantrum about how she wanted him out of politics—a tantrum that some suspect was so beautifully staged that she deserves an Academy Award. (Why, one won-

ders, did the prosecution not call Stans or Mitchell to testify?)

When Sloan testified before the jury, Sirica apparently did not like the prosecution's examination. It had the smell of a "sweetheart" affair. So the judge decided to read to the jury portions of Sloan's testimony outside the jury's presence. The defense protested—naturally. The prosecution protested—incredibly.

The judge said he was informing the jury of what Sloan had told him so the jury could decide whether Sloan had told the truth in his testimony in their presence.

Sirica insisted that he would intervene and ask questions whenever he thought "all the facts have not been developed by either side."

He had a lot of intervening to do in this case of one of the most sordid, sinister operations in the history of American presidential elections. But Sirica had the guts and the integrity to intervene. And all the American people can find comfort in that, for it is warmly reassuring evidence that the day has not yet come when money and political IOUs run everything in this country.

THE WASHINGTON STAR-NEWS
May 27, 1973

By Mary McGrory

A SITE FOR SIRICA PARK

Let us proceed at once to stop the construction of the new FBI building. It was meant to be a memorial to J. Edgar Hoover, and while we have just learned that he vetoed some of the President's wilder schemes for putting the entire nation under surveillance, his reputation is presently undergoing some drastic revision.

Whether he was the gangbuster of boyish worship or the blackmailer of recent revelation, let us sort out our impressions of him before we desecrate a whole block of downtown Washington in his name.

The structure is half-built, and it is hideous. Does the country really need another vault of secrets? Do we all have to be in dossiers? The FBI did wonderfully well at catching kidnapers and car thieves in its old quarters. Let them stay there and leave the super-vigilance to God.

Let us, instead, level it, with our bare hands if necessary. Let us make the ground into a park and name it after Judge John J. Sirica, the man to whom we owe our liberty, if we still have any.

We may not have enough police in this country, on foot or in patrol cars. But we have had enough spies to last us for a century. The Nixon administration was one vast web of espionage. They created their own network inside the White House. They spied on each other, on the press, on Democrats, on critics and inevitably ended up spying on themselves. Enough.

So let's plough up the ground and plant it with green grass and sow it with fragrant pinks. Watergate took us to the brink of a police state and a park would be the best reminder of what almost happened and of what should never be allowed to happen again.

Right in the middle, put a statue of John Sirica, the immigrant's son who knew what the Founders had in mind and pried up the rock to show the maggots and worms underneath.

He has already provided the inscription. In District Court he said to the Watergate culprits: "It is not too late. I have always had the theory the truth never hurt anybody."

A fountain of purest water, if there is any, should play nearby, surrounded by benches named for various people

who saved us from drowning in the dirty pool. Frank Wills, the security guard who called the cops on June 17; the casual clothes policeman, Paul W. Leeper, John Barrett and Carl Shouffler, who "responded."

A gazebo twined with roses should bear the name of Sen. Sam Ervin, who also "responded." It should be paved with large stones, carved with lines from the Constitution: "Life, liberty and the pursuit of happiness."

Those CRP flip-charts, which cost G. Gordon Liddy $7,000, should be set up as dart-boards for the amusement of government workers at lunchtime. Anyone scoring a direct hit on Larry O'Brien's office would get a free drink at the park bar.—"The Tap," of course.

A carousel with a printing press for its center, and dedicated to reporters Carl Bernstein and Bob Woodward, who are both young enough to enjoy it, could operate through the daylight hours. It, as well as the day-care center, should be run by the CIA, which should at least come out in the open and watch over people we are sure need surveillance.

A permanent rock group—"The Executive Privilege" or perhaps "The Plumbers," the matter could be adjudicated by Congress—should play for dancing from lunchtime on.

Naturally the park should have its educational side. A museum, "Cover-Up Hall," should have on display the horrors recently exposed and never to be repeated: burn-bags, paper-shredders, laundered money, forged cables, affidavits, indictments, bugs, wigs, masks, voice-alteration devices, the denials of Ronald Ziegler, the statements of the President about "major developments" and "national security," the firearms carried by various campaign officials in their search for a mandate. It could be financed by CRP's $6 million surplus. Campaign reform will make partisan fortunes inoperative.

We don't know the whole story yet. But it's time to start thinking about a way that will insure that we will never forget it and create something that will be there forever to tell us what we are supposed to be and what we almost became.

APPENDIX 4

SUBMISSION OF
RECORDED PRESIDENTIAL CONVERSATIONS
TO THE
COMMITTEE ON THE JUDICIARY
OF THE
HOUSE OF REPRESENTATIVES
BY
PRESIDENT RICHARD NIXON

APRIL 30, 1974

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42 D There are two routes. One is to figure out how to cut the loses and minimize the human impact and get you up and out and away from it in any way. In a way it would never come back to haunt you. That is one general alternative. The other is to go down the road, just hunker down, fight it at every corner, every turn, don't let people testify—cover it up is what we really are talking about. Just keep it buried, and just hope that we can do it, hope that we make good decisions at the right time, keep our heads cool, we make the right moves.

P And just take the heat?

D And just take the heat.

P Now with the second line of attack. You can discuss this (unintelligible) the way you want to. Still consider my scheme of having you brief the Cabinet, just in very general terms and the leaders in very general terms and maybe some very general statement with regard to my investigation. Answer questions, basically on the basis of what they

told you, not what you know. Haldeman is not involved. Erlichman is not involved.

D If we go that route Sir, I can give a show we can sell them just like we were selling Wheaties on our position. There's no——

P The problem that you have are these mine fields down the road. I think the most difficult problem are the
43 guys who are going to jail. I think you are right about that.

D I agree.

P Now. And also the fact that we are not going to be able to give them clemency.

D That's right. How long will they take? How long will they sit there? I don't know. We don't know what they will be sentenced to. There's always a chance——

P Thirty years, isn't it?

D It could be. You know, they haven't announced yet, but it——

P Top is thirty years, isn't it?

D It is even higher than that. It is about 50 years. It all——

P So ridiculous!

D And what is so incredible is, he is (unintelligible)

P People break and enter, etc., and get two years. No weapons! No results! What the hell are they talking about?

D The individuals who are charged with shooting John Stennis are on the street. They were given, you know, one was put out on his personal recognizance rather than bond. They've got these fellows all stuck with $100,000 bonds. It's the same Judge, Sirica, let one guy who is charged with shooting a United States Senator out on the street.

P Sirica?

D Yes—it is phenomenal.

P What is the matter with him? I thought he was a hard liner.

44 D He is. He is just a peculiar animal, and he set the bond for one of the others somewhere around 50 or 60,000. But still, that guy is in. Didn't make bond, but still 60 thousand dollars as opposed to $100,000 for these guys is phenomenal.

P When could you have this meeting with these fellows as I think time is of the essence. Could you do it this afternoon?

D Well, Mitchell isn't here. It might be worth it to have him come down. I think that Bob and John did not want to talk to John Mitchell about this, and I don't believe they have had any conversation with him about it.

P Well, I will get Haldeman in here now.

D Bob and I have talked about it, just as we are talking about it this morning. I told him I thought that you should have the facts and he agrees. Of course, we have some tough problems down the road if we—(inaudible) Let me say (unintelligible) How do we handle all (unintelligible)) who knew all about this in advance. Let me have some of your thoughts on that.

D Well we can always, you know, on the other side charge them with blackmailing us. This is absurd stuff they are saying, and

P See, the way you put it out here, letting it all hang out, it may never get there.

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18 H If he will take it on that basis.

D The answer is, of course, in the course of this investigation I don't know whether he would talk to me off-the-record.

H What are your options?

E Boy, if you could eliminate the option by taking a legal position. You knew nothing about it.

P So you don't see the statement thing helping insofar as in anyway sparking the start? You think that over some more.

D Yes sir. You see it is a temporary cancer.

P I agree with that. And the point is,—but you see, here is the way I would see the statement that we would put out: Everything we would intend to say in a general statement that I have already indicated with regard to the facts as we send them in, we say people are to cooperate, without executive privilege, et cetera. Statement, it is true, is temporary. But it will indicate that the President has looked into the matter, has had his Counsel report to him and this is the result of the matter. We tell the Committee "we will cooperate." The Committee will say no. And so we just stand right there.

D Well, really I think what will complicate the problem will be Sirica giving a speech from the Bench on Friday when he sentences. Where he will charge that he doesn't believe that the trial conducted by the lawyers for the government presented a legitimate case and that he is not convinced that the case represents the ful situation.

H In other words——

D It will have a dramatic impact coming from the Bench.

P That's right.

D I may say in Sirica's defense, it has been charged that there are higher-ups involved in this. He may take some dramatic action like, he might appoint a special prosecutor, Who knows?

P Can he do that?

D Sure.

P He would appoint a special prosecutor, for what?

D For work in the field of investigating. He is the Presiding Judge.

H You know he can pick the Grand Jury. Or he said he could.

P The government is going to do that for a while.

D A week after sentencing they are going to take all of the people who have been sentenced before a Grand Jury——

P These same ones?

D These same ones. And see if they will now want to talk. When it comes to Sirica and sentencing, he may be giving the ones who talk a lesser sentence. If they don't talk, he will probably leave these long sentences stand.

P Suppose he does that. Where does that leave us, John?

E I don't think that is a surprise to the defendants. I think their counsel has advised them of that.

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47 Yes but he does—but not in firsthand sense——

P Only by hearsay.

HP But you see—if he makes that statement in open court——

P Yeah, I get it.

HP It seems to me it makes your practical difficulties just as severe as if we had named him in the first place.

P Well I am glad to get this kind of stuff so I get a clear view of everything—what the options are——

HP And if we frankly—if we think that Sirica is going to elicit that kind of statement we will include him in the charge to the extent that we can.

P Yeah—sure you don't want to . . .

HP Subject only to the fact that we can corroborate it later on.

P Timing now. What about Magruder—you don't expect him tomorrow?

HP Well I told them . . . Probably not today, but I guarantee you at least twelve hours notice.

P Can you give me that much?

HP I will guarantee you that. I will hold it up to make certain you get it.

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P Yeah. The only—Yeah. On the other hand I
68 suppose you should say (inaudible) story—it got a hell of a big play.

HP I didn't see it.

P And other stories that are not so likely to (inaudible) could, could—everything is likely to blow around here. But at least you give me the—there is nothing in this that we irritate the fact that do we (inaudible) til down there in that court we know this damn (inaudible).

HP That's right.

P So basically we are in a pretty good position to say—that except as I said I don't want the Washington Post to break this case.

HP That's right. We don't either.

P I want the Department of Justice—and, frankly, the White House—because as you can see we'll cooperate (inaudible).

P OK—I can see what you mean. You would anticipate then that if you didn't include Haldeman and Ehrlichman in your general thing that Sirica will question the defendant—Magruder—and he then will bring in——

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HP If he brings that out—if we think that is a
49 real possibility then we will have to decide whether or not as a matter of conscience and professional ethics we can put them it. If we can answer that yes—then we will put them in. If on the other hand, we think there is no basis for it—even if Sirica does bring out the hearsay—we will just have to take the knuckle for it.

P Sure—which is basically what Sirica wants. Colson—I think we should know about him too.

HP Well,

P Not yet, huh?

HP Well, Bittman went to Colson to urge leniency—Colson then got in touch with Ehrlichman and Dean. Ehrlichman is alleged to have said——

P Make no commitments.

HP we'll do the best we can—make no commitments. Then thereafter you know apparently money flows—or so we are told—whether there is any relevancy or relationship remains to be determined.

P What did Bittman want?

HP Well apparently the funds, but that remains to be developed—ah, Dorothy Hunt was, acording to McCord, the intermediary the leniency thing (inaudible)

P Right.

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34 P (expletive removed) if you give them immunity here—he sees (inaudible) the Gray think and all the rest—Dean is." Whatever area we think Dean is in, in the public mind, he is a big shot. Ervin thinks he is a big shot, the whole Senate Judiciary Committee—Dean is the guy that the whole Executive Privilege thing is about. So we give him immunity? I hadn't thought about it when you first talked about it.

HP Sounds . . .

P But you must have thought about it.

HP I have—indeed. It is the toughest decision I have facing me.

P Well what the hell—he can talk without any immunity can't he? Oh I guess if he is a defendant he wouldn't talk to you.

HP That's right.

P (inaudible) of course he wouldn't (inaudible). Is that your problem?

HP You know if I get—yes—of course even if I come up with a leser charge that damn Sirica is just liable to blast hell out of all of us to prevent him to plead even to a lesser charge. The ideal position would be the same as Magruder—you plead to one count felony indictment—take your chances.

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6 P I said no. I said, by no means, I'd get the rack.

R They'd say that you worked it out so Dean——

P Well, they're going to. Then the other way—the way Dean's appeal is the U.S. Attorney's people. Well, Petersen said he agreed with that. He was trying to convince the U.S. Attorneys of that, but they are hot on trying to give him immunity and they're going to. And they want to (unintelligible) Haldeman and Ehrlichman. Frankly, that's it. And then they said—and then it's a cop out (unintelligible). Why do you think they should go? On what basis? Here's what we have in mind. I'll tell you what this statement was on. They're going to have Magruder in open court eventually. Haven't made the deal with him yet either, but they wil. (Unintelligible) questions (unintelligible) they're going to put out this statement in which they will name other what they call non-indicted co-con-

spirators. I keep hearing about the names of people that he must charge. That's all (unintelligible). He said Sirica, otherwise, will ask him questions and he's going to
7 testify publicly in open court about other people. I think that is a hell of a prejudicial thing to do—the rights of an individual—but I don't know how—have you ever heard of that? And I said—and then they said, "Haldeman and Ehrlichman will not be on that list if they take a leave—if you fire them." I said, "Are you telling me if I fire them, you won't prosecute them?" "Oh, no, no, but I mean won't be on that list." "But you—have you said if they're on that list they'll have to take 'em?" And then they said—I said, "Well, what are you saying?" He said, "Well, we just felt we were giving you an option, that you could move ahead of the herd basically by just letting them go." But on the other hand, Bill, I think—I think that whether they're on the list—if I let 'em go they're on the list anyway. It appears that I just—I heard they were going to be on the list and I fired them and they were on it. Then it looks as if we're not prosecuting. That's my problem. We're not prosecuting my two
8 top people and I let them go. I don't think that makes sense at all or do you agree? Am I missing something here?

R You don't seem to.

P Well, tell me that. Well, wouldn't it look bad? Bad?

R Oh, sure. From your standpoint. Yeah.

P If I let Haldeman and Ehrlichman go and they didn't have them on the list, they will call them before the Grand Jury and then indict them if they get information.

R Well you see, Mr. President, the only reason a judge questions a defendant when there's a plea of guilty——

P Yeah.

R Is to make sure that he's pleading voluntarily and that he knows the nature of his pleading.

P Yeah. But right. Right. But Sirica has exceeded that hasn't he, Bill? That's the point.

R Well.

P He's asking now who else was involved. See that's what he's going to ask. "Was he involved?"

9 R It seems to me that if he's doing that——

P I think he'll act like he did over McCord.

R Well, if he does that, that's a perversion of the Grand Jury process. The whole idea of the Grand Jury process is to protect people—

P Yeah.

R Until they are indicted. And once they are indicted, then they are presumed to be innocent until we go to trial. One of the reasons you have a Grand Jury proceeding is so you don't have innocent names and then (unintelligible) to the public.

P Well, I'll tell you. Let me put it this way. (Unintelligible) Haldeman and Ehrlichman, on a thing like this—Ehrlichman—frankly, I think he's going to beat it. I don't think it's going to help him, if by letting him go, I know that he's gone to the prosecution. I told him——

R You shouldn't—you shouldn't be faced with those problems.

P I know I don't have any (unintelligible). Don't you agree with me that that was—you know I am concerned about

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15 P They just thought that might hurt the election.

R Same thing is true is Vesco. That case he's involved in.

P Belongs to the courts. I'd rather have it there than in the Committee.

R Oh, sure.

P Wouldn't you? At least the court doesn't try——

R Well, that's the way it's supposed to be. That's the system. The system is——

P It sure shows the system works, though, doesn't it? And I get amused, I had (unintelligible) in all Sunday, had 'em in Monday, I had him in here today. I fired out my statement, and I said——

R What'd he say about your statement?

P Petersen? Oh, he thought it was fine. I got to thank him for it.

R Is he going to (unintelligible) accuse other people in open court?

P That's just like Sirica (unintelligible).

16 R Well, I can see—Sirica was, he was suspicious there was a cover-up.

P That's right.

R He was trying to, he was trying to put pressure on the ones who knew so he could——

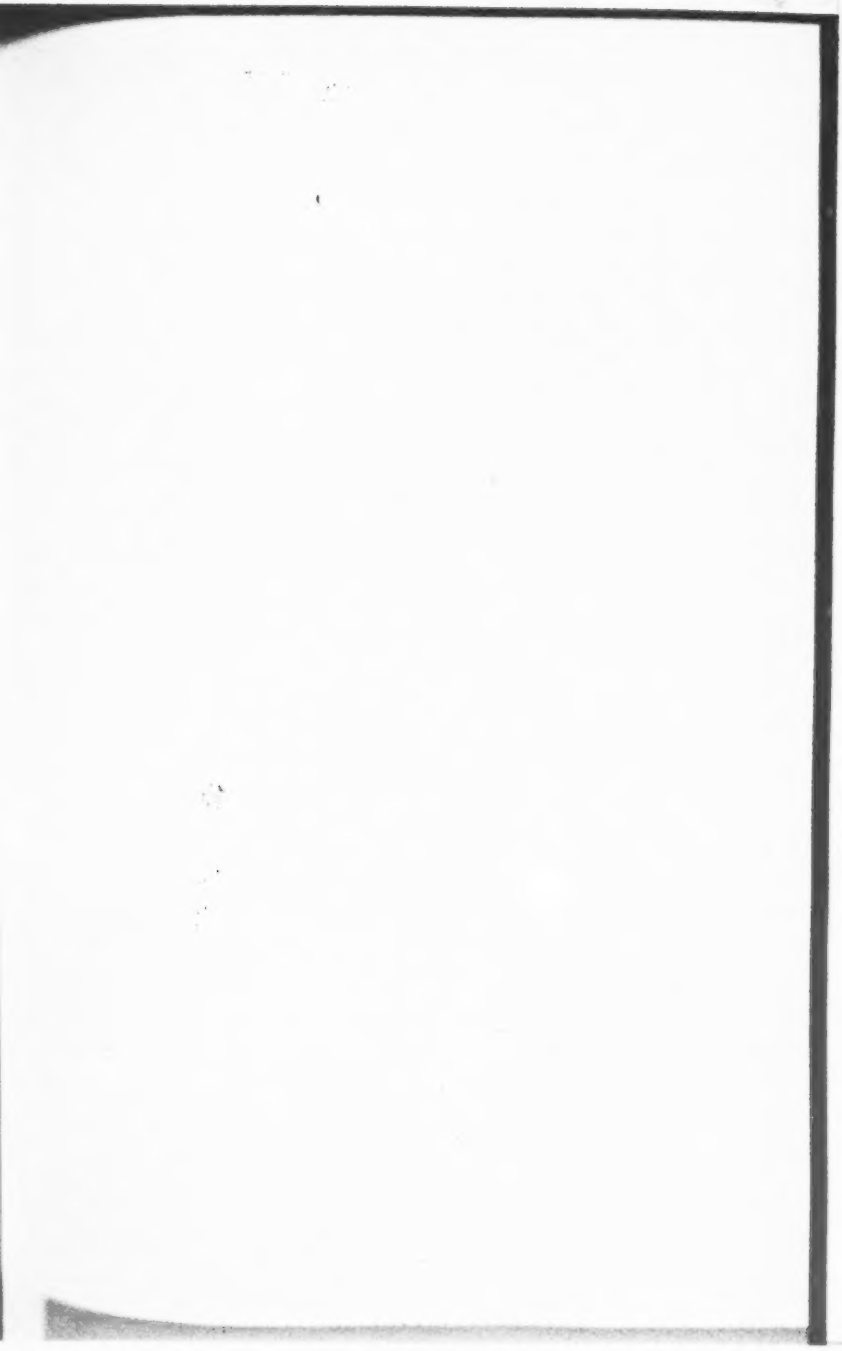
P Not only to confess about themselves, but about other ones. That point, of course, they'd say that Magruder has acknowledged, Magruder has confessed—but what about others? What about (unintelligible)?

R What I mean is here you've got a willing witness. Before he was doing it to reluctant defendants. Here you got a willing, as I understand it, a willing one.

P Who will testify.

R Who will testify, has been working with the prosecutor and who's going to, will be called before the Grand Jury. Why the hell he's—that (uninteligible) open court. That's the—that's what the Grand Jury's for. Makes a nice little backdrop for your Italian dinner.

P Oh, it'll be alright. They'll have a fine dinner and wine.



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